

CASES  
ARGUED AND DETERMINED  
BY THE  
SUPREME COURT  
OF  
The State of Missouri  
AT THE  
APRIL TERM, 1884.

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MILLER *et al.*, Appellants, v. LULLMAN, Administrator, *et al.*

**Deed, Delivery of.** M. and wife, by deed duly executed, acknowledged and delivered, conveyed certain premises to a trustee for the separate use of his wife; on the same day M. and wife, and the trustee, executed a quit-claim deed for the same premises to one K., who, on the same day also executed a quit-claim deed for the same premises back to M. The deed by M. and wife to the trustee was recorded on the day of its execution, while the other deeds were not recorded, but were retained by M., and were found among his papers after his death. The evidence as to the circumstances attend-

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ing the execution of the deeds, showed that it was M.'s purpose, known and assented to by all the parties thereto, to divest himself of the title for the benefit of his wife, and at the same time to reserve to himself the power, at his pleasure, to re-invest the title in himself, and that the deeds from M. and wife to the trustee, and from the latter to K., were not to be regarded as delivered until M. should record them; *Held*, that there was no delivery to K. of the deed to him, and that the trustee for the wife of M. was not divested of the legal title.

*Appeal from St. Louis Court of Appeals.*

**AFFIRMED.**

*Overall & Judson* for appellants.

The deed from Mrs. Miller and Mead was duly executed, and conveyed the title, both legal and equitable, to the premises in controversy. *Lincoln v. Rowe*, 51 Mo. 574; *Siemers v. Kleeburg*, 56 Mo. 197. The deed from Mrs. Miller and Mead to Kerr was duly acknowledged. The certificate of acknowledgment is not affected by the "relinquishment of dower" contained in it. *Chauvin v. Wagner*, 18 Mo. 531; *DeLassus v. Poston*, 19 Mo. 425. The deed from Mrs. Miller and Mead was delivered to Kerr. *Gould v. Day*, 94 U. S. 112; *Jackson v. Cleveland*, 15 Mich. 101; *Somers v. Pumphrey*, 24 Ind. 240; 3 Washburn Real Prop., (4 Ed.) p. 285; Martindale on Conveyancing, p. 174; *Kane v. McCown*, 55 Mo. 198; *Devorse v. Snider*, 60 Mo. 240; *Huey v. Huey*, 65 Mo. 695. The deed from Kerr to Miller was duly executed, acknowledged and delivered. *Ward v. Lewis*, 4 Pick. 520; 3 Washburn Real Prop., (4 Ed.) p. 294; Martindale on Conveyancing, p. 174. The possession by Miller, the grantee, of the deeds was absolute, not in escrow. 3 Washburn Real Prop., (3 Ed.) pp. 267, 241. The legal effect of the deeds thus executed, acknowledged and delivered, was to vest the title to the lands in Geo. C. Miller, and at whose decease intestate said title was cast upon the heirs. The quit-claim deed was as operative to convey the title as any other. 3 Washburn Real Prop., (4 Ed.) p. 357; *Kule*



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*v. Kavanaugh*, 103 Mass. 380; Martindale on Convey., § 59; Tiedeman on Real Prop., p. 598; *Pugh v. Chesseldine*, 11 Ohio 109; *Chapman v. Sims*, 53 Miss. 169. Cited approvingly in *Fox v. Hall*, 74 Mo. 317. The non-recording of the deeds was, *inter partes*, wholly immaterial. *Maupin v. Emmons*, 47 Mo. 306; 3 Washburn Real Prop., (4 Ed.) 316; Martindale on Conveyancing, p. 228; *Harrington v. Foltner*, 58 Mo. 473. Nor could recital of consideration be contradicted to impeach the title conveyed by the deeds. *Poe v. Domic*, 48 Mo. 442; *Martin v. Jones*, 59 Mo. 181. Nor is it material as to title conveyed, that the deeds were executed on same occasion in order of succession of title. The "construction together" "as one transaction" of the three deeds, is fatal to the claim of Mrs. Miller. 15 Sim. 76; 6 DeG. M. & G. 43; 11 Abb. (N. S.) 150. The title having been thus re-vested in Miller by the deeds, duly executed and delivered, the oral declarations of Miller were inadmissible to contradict the legal effect of the deeds, and to establish an alleged intended execution "of a marriage settlement with power of revocation." There was no "antenuptial promise." 29 Ark. 407; 5 Johns. Ch. 12. The testimony was insufficient to establish the alleged "intent." The conveyances cannot be assailed in the appellate courts on the ground of fraud, duress or undue influence exerted upon Mrs. Miller, no such defense having been made in the circuit court, and the facts sustaining no such defense. *St. Louis, etc., v. Bagnell*, 76 Mo. 554; 2 Lead. Cases, p. 1215; *Handy v. Van Harlington*, 7 Ohio St. 208; *McMahon v. Ryan*, 8 Harris (Pa.) 329; *Hollis v. Francois*, 5 Tex. 195. The petition was properly framed, and presented a case for equitable relief. 3 Pomeroy Eq. Juris., § 1398, and cases cited.

*Henry Hitchcock* for respondent.

The conveyance by Miller and wife and her trustee to Kerr, never took effect by delivery. No deed can take effect without delivery, and there is no delivery if the deed

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remains within the control or subject to the authority of the grantor, or if it be in the hands of a third person as his mere agent, and subject to his directions. *Huey v. Huey*, 65 Mo. 689, 695; *Cook v. Brown*, 34 N. H. 464; *Younge v. Guilbeau*, 3 Wall. 636; *Duer v. James*, 42 Md. 492; *Com. B'k v. Reckless*, 1 Halst. Ch. (N. J.) 430; *Prustman v. Barker*, 30 Wis. 651; *Jones v. Bush*, 4 Harrington 7; *Ward v. Ward*, 2 Hay. (N. C.) 226; *Clayton v. Liverman*, 4 Dev. & Bat. (L. R.) 239; *Sutwell v. Hubbard*, 20 Wend. 44; *Maynard v. Maynard*, 10 Mass. 456; *Burnett v. Burnett*, 40 Mich. 361.

HENRY, J.—Plaintiffs filed their petition in the circuit court of St. Louis, praying that the title to certain real estate therein described, be adjudged to have been vested in Geo. C. Miller by certain conveyances therein mentioned, and now in plaintiffs, as his heirs at law, subject to administration and the widow's right of dower. The facts alleged upon which that decree is asked are, that on the 26th of February, 1879, Geo. C. Miller and his wife, the defendant, Kate C. Miller, by deed duly executed, acknowledged and delivered, conveyed said real estate to A. W. Mead, in trust, for the sole and separate use of said Kate C. Miller. That on the same day Mead and Miller and wife executed a quit-claim deed of the same to Robt P. Kerr, who on the same day executed a quit-claim deed, conveying said property to Geo. C. Miller. The deed to Mead was recorded February 27th, 1879, while neither of the other deeds was ever recorded, but were found by defendant, Mrs. Miller, among her husband's papers after his death which occurred in Louisville, Kentucky, in June, 1879. That she refused to surrender the deeds, claiming the property as hers under the deed to Mead. The defendant, Lullman, filed an answer consisting of a general denial, and Kate C. Miller filed her separate answer, admitting the execution of the several deeds, but alleging that the deed to Kerr was never delivered to him, and that George C. Miller, with the view of retaining the power

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to revoke the grant to Mead in trust for her, requested her and said Mead to join with him in the conveyance of said property to Kerr, and advised Kerr to execute a conveyance to Geo. C. Miller of the said property. That he never executed the power of revocation, etc.

On the trial in the circuit court the three deeds were introduced in evidence. It was admitted that the deed to Kerr, and his to Miller, were in possession of the latter, at his death, neither having been recorded, and that Kate C. Miller was in possession of them when this suit was commenced. The testimony of the defense, was that of Mrs. Benedict, sister of Mrs. Miller, and Mead and Kerr. Mrs. Benedict testified that she was intimate with Miller, who told her before his marriage with her sister, that he intended to convey the property to his wife, in order to protect her. Shortly before their marriage, he told the witness he intended to give his wife the property as a bridal present. Mead testified that he was a lawyer. Identified the deeds, the first two having been prepared by him, and that of Kerr to Miller, having been written by Miller. That Miller was engaged with Mr. Jewett in some land litigation, and that his property was advertised for sale under a fee bill, or execution for about \$600, and he came from Louisville to St. Louis with his wife, and in a conversation with witness, said he was tired of these land cases, and wanted to give his property to his wife, but said he wouldn't trust her, and asked witness how he could hold a control over her, and witness advised him to convey the property to some one in trust for her, and then he and wife and the trustee convey it to Bob Kerr, and he reconvey it to Miller. He followed this advice, and the deeds were all signed and acknowledged at Miller's room, at the Lindell Hotel. Kerr never took possession of the deed to him, but signed and acknowledged his deed to Miller, leaving the deed to himself on the table. Witness took all the deeds to the recorder's office and had the one to himself recorded, returning the others to Geo. C. Miller. Kerr testified that

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Miller requested him to meet him at McCabe's office. Said he was going to give his property to his wife, and that she would give witness a quit-claim deed to the property which witness was to convey to Miller by quit-claim deed. *Miller said he wanted to hold the deeds and not record them, so that in case of difficulty with his wife, he could record them.*

The circuit court entered a decree in accordance with the prayer of the petition, but on appeal to the court of appeals the judgment was reversed and plaintiffs have appealed to this court. There was not sufficient evidence of such a marriage contract between Miller and his wife as would interfere with his absolute dominion over his property, subject only to her dower right. Therefore, if the deed to Kerr was not delivered to him by the grantors, it did not pass the title to the property, and it is unnecessary to consider the other questions ably and elaborately argued in the briefs of counsel. In order to ascertain whether there was a delivery of that deed or not, the intention of the parties in the entire transaction must be considered in connection with what they said and did. It is beyond question that Miller's purpose, known and assented to by all the parties, was to divest himself of the title for the benefit of his wife, reserving the power, at his pleasure, to re-invest in himself, and the method adopted was that suggested by his attorney, who was, also, the trustee of Mrs. Miller. The delivery to Kerr of the deed to him, and of that from him to Miller, would have defeated the object in view, and left the property just where it was on the morning of the day that the deeds were all executed and acknowledged.

The execution and acknowledgment of the three deeds was but one transaction, and it would have been useless and ineffective if the deed to Kerr had been delivered to him. Still, if it was in fact delivered, the title passed and we must give the deed its legal effect. Was it delivered? "It is requisite in every well made deed, that there be a delivery of it. The delivery must be either actual, by doing something and saying nothing; or else verbal, by saying

something and doing nothing, or it may be by both; but by one or both of these it must be made, for otherwise, though it be never so well sealed and written, yet is the deed of no force." *Jackson v. Phipps*, 12 John. 421. "The delivery of a deed is completed when the grantor has parted with the dominion over it, with intent that it shall pass to the grantee, provided the latter assent to it, either by himself or by his agent." *Greenleaf Ev.*, § 297; *Huey v. Huey*, 65 Mo. 690; *Cook v. Brown*, 34 N. H. 460. Kerr never had possession of the deed. It is not proved that he ever examined or saw it. The grantors never told him to take possession of it. He signed and acknowledged the deed to Miller, and immediately left the room in which the transaction took place, never having had possession or control of the deed in question or authority to take it. The very object and intent of the transaction was inconsistent with a delivery of the deed to Kerr, and consistent with the retention of the possession of, and dominion over the deed by Miller. But it is contended that the execution and delivery of the deed by Kerr to Miller, amounted to a delivery to Kerr of the deed to him. Such was manifestly not the intent. But in order to effect the object of all the parties, it was necessary that the deed from Kerr to Miller should be delivered to Miller, and that from Miller and wife and Mead to Kerr should not be delivered to Kerr, but retained by Miller. When no actual or verbal delivery is made, how can it be maintained that an act in furtherance of a purpose in the minds of all the parties is to be regarded as a constructive and effective delivery, when it would frustrate and defeat their main intent? Especially when the act is not in relation to the deed in question, but to another deed to which but two of the persons concerned in the other deeds were parties? But it is contended that if Miller had had the deed to Kerr placed upon record, as he might have done, it would have divested Mrs. Miller of her title. That may be, but that is saying no more than that if the deed had been delivered, it would have vested the title in Kerr,



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for it was the understanding of the parties, Kerr included, that it was not to be regarded as delivered until recorded, but if it had been placed upon record by Miller, the law would have presumed a delivery of the deed. *Devorse v. Snyder*, 60 Mo. 240. But is a delivery to be presumed from the ability of the grantor to place it upon record? Or, in other words, because a grantor had it in his power to deliver a deed, is it to be inferred that he did? If so, if one execute a conveyance to another, retaining possession of the deed, and it is found among his papers after his death, the title would pass to the grantee, because the grantor might, if he had chosen, have placed it upon record.

The testimony of Kerr makes it clear that the deed was neither delivered, nor to be delivered, until Miller should see proper to have it recorded. "Miller said he wanted to hold the deeds and not record them, so in case there was difficulty or trouble between his wife and him, he would record them." This is the testimony of Kerr, and this conversation occurred when Kerr was asked to sign the deed. We are of the opinion, that the deed in question was never delivered to Kerr, and that the trustee of Mrs. Miller had never been divested of the legal title, and, therefore, affirm the judgment of the court of appeals. All concur except SHERWOOD, J., absent.

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BURDEN *et al.*, Plaintiffs in Error, v. JOHNSON *et al.*

**Lien, Sale to Satisfy:** SUBROGATION. Where one has become a purchaser in good faith, under a sale which proves to be void for irregularity, and the purchase money has been applied to a satisfaction of the lien for which the sale was ordered, the purchaser becomes subrogated to the rights of the lien-holder to the extent of his payment, but when the proceedings are regular in all respects, and the decree is effectual in subjecting to its behests the interests and estates of all parties before the court, such subrogation, especially in the absence of fraud, will not be made.

*Error to Johnson Circuit Court.*—HON. NOAH M. GIVAN,  
Judge.

AFFIRMED.

*John J. Cockrell* for plaintiffs in error.

The petition in this case is a supplementary bill filed by the assignees, by subrogation of the plaintiffs, against the heirs of the original defendants, to bring in and sell the interest of a party who should have been a party to the original action. A supplementary bill must be filed in the original cause, and may be filed at any time, either before or after a final decree. Story's Eq. Plead., p. 338. And relief can only be obtained in such original action. *Goode-now v. Ever*. 16 Cal. 411. There is no defect of parties plaintiff or defendant. Ella F. Culley is only heir of original defendants, and is also the new party whose title is sought to be reached by the supplementary bill. Petitioners show that they hold under purchases at execution sale, and hence are subrogated to the rights of the original plaintiffs, and entitled to the relief prayed. Sheldon on Subrogation, §§ 33, 34, 38. This action is not barred by limitations, lapse of time or presumption of payment of the judgment in probate court. Petitioners occupy the position of mortgagees in possession. While they are in possession, the statute cannot run against them. The statute only commenced to run against petitioners after they were ejected. The proposition seems almost too plain to argue. When a party with a defective title to real estate, is in possession under his title, limitation is not running against him, but against the party not in possession. The petition shows that some of the petitioners are still in possession, and others recently ejected. Under such circumstances, the rights claimed by petitioners here cannot be barred by statute of limitations or lapse of time. *Caldwell v. Palmer*, 6 Lea (Tenn.) 652; *Brobst v. Brock*, 10 Wall. 519.



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The petition states a good cause of action. The petitioners, by subrogation, stand in exactly the same position as the original plaintiffs, as far as the amount of purchase money paid by their grantors at the execution sale. The object of the original action was to sell certain real estate to satisfy a debt—the same as a mortgage foreclosure. The defect in the title was caused by failure to join a necessary party defendant, as would be the case in a foreclosure case where the grantee of the mortgageor was not a party. Petitioners are entitled to the relief prayed. Sheldon on Subrogation, §§ 33, 34, 38; *Goodenow v. Ever*, 16 Cal. 471; *Boggs v. Hargrave*, 16 Cal. 563; *Burton v. Lies*, 21 Cal. 91; Freeman on Void Judicial Sales, § 47, p. 65; Freeman on Ex., §§ 54, 362, p. 548; *Ross v. Boardman*, 22 Hun (N. Y.) 527; *Brost v. Brock*, 10 Wall. 519; *Caldwell v. Palmer*, 6 Lea (Tenn.) 652.

*S. T. White* for respondent.

The petition contains no facts showing a right of substitution in plaintiffs in error, as plaintiffs of the original suit. *Clamorgan v. Guisse*, 1 Mo. 141; *Lindall v. Brunt*, 17 Mo. 150. The petition states no facts showing that plaintiffs are entitled to relief in this action. There is no equity in the bill. *Hendricks v. Wright*, 50 Mo. 311; *Daily v. Jessup*, 72 Mo. 144; Bishop on Con., § 144. Plaintiffs are barred in this proceeding by lapse of time. *Rogers v. Brown*, 61 Mo. 187; *Hughes v. Littrell*, 75 Mo. 573. This proceeding has no parallel. It is an attempt to assert newly acquired rights under the title of an old action that had passed into a judgment almost twenty years before this one was begun. Neither the rights nor the parties are the same in the two actions. The plaintiffs were purchasers at a sheriff's sale under the rule of *caveat emptor*, and merely took, in law and equity, what the judgment gave them.

MARTIN, C.—On the 23rd of January, 1880, the plaint-

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iffs in error filed a petition in equity against Ella F. Cully and James W. Cully, her husband, which had for its object the opening up and widening of a decree rendered April 19th, 1861, in a certain suit wherein James M. Burden and Charles Burden, were plaintiffs, and Amos M. Perry, administrator of William Burden, Rosannah M. Johnson and William Johnson, were defendants.

The proceeding is an unusual one, both in form and scope. The defendants demurred for insufficiency of facts to constitute a cause of action, and the demurrer was sustained. Upon this ruling final judgment was entered, from which the plaintiffs have prosecuted their writ of error. The facts disclosed in the petition are substantially as we recite them, in a different grouping and phraseology.

As early as May, 1854, William Burden was indebted to his sons James and Charles, in the sum of \$1,157 for money borrowed and other considerations. During the existence of this indebtedness, said William Burden entered into a marriage contract with Rosannah M. Paden, and in consideration of a marriage, which was afterward consummated, he, on the 11th of May, 1854, conveyed to her and to her heirs begotten by him, certain parcels of real estate which are described in the petition. On the 29th of September, 1855, William Burden died without having discharged the indebtedness aforesaid, leaving his widow and one child, named Ella F. Burden, surviving him. His widow was afterward married to William Johnson, and his daughter to James W. Cully.

William Burden's estate not being sufficient to pay his debts, his two sons, James and Charles, on the 10th of March, 1858, commenced a suit in the nature of a creditor's bill, for the purpose of setting aside the ante-nuptial contract of their father, and subjecting the real estate settled by him upon his intended wife, to the demands of his creditors, upon the ground that the settlement was void as against creditors. In this suit the widow and the administrator were the only parties proceeded against. The suit

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resulted in a decree for plaintiffs, on the 19th of April, 1861, charging the real estate with the debt described in the petition, and ordering a sale of so much of the lands as would be required to satisfy it. Curious enough, as it seems from recitals in the decree, Ella F. Cully and James W. Cully, by attorney, appeared and moved in arrest of the decree, although no parties to it. Their motion was overruled. They also tendered a bill of exceptions, which was allowed and signed.

By virtue of a special execution to enforce the decree, a sale of a large portion of the land in controversy, was made by the sheriff to different parties, on the 22nd of April, 1865. At the date of this sale Rosannah M. Johnson had been dead about a month. The parties prosecuting the writ of error herein, were either purchasers at said sale, or hold title derived from such purchasers. The purchasers and their grantees entered into possession of the land so purchased, immediately after the sale, and have been in possession, holding the same as their own, ever since, having greatly improved their respective purchases, by the erection of buildings and fences, and the planting of orchards. The petition then goes on to say that Ella F. Cully and her husband, in 1879, brought suit in ejectment, and recovered some of the land purchased at said sale, and that similar suits for the recovery of the parcels owned by the plaintiffs in error are pending undetermined.

It is further alleged, that the purchasers at said sale, believed that they were acquiring the fee simple title to said lands, and that their improvements were made under that belief, and in good faith, without any notice of the claim of said Ella F. Cully to the same. The petition concludes with a prayer to the court to open up the decree rendered in 1861, and vacate the apparent satisfaction thereof, to make Ella F. Cully and James W. Cully parties to the proceedings in said suit; to adjudge the marriage conveyance fraudulent as to creditors, and to enforce the creditors' demand in the suit, against the real estate by sale of a suffi-

cient portion to satisfy it, subject however, to the value of the improvements which is to be ascertained; also to restrain all further proceedings in the ejectment suits of Mr. and Mrs. Cully until the final termination of this cause and for other proper relief.

Before considering the merits of this petition, I will be excused for remarking that the deed of ante-nuptial settlement is not before us for construction. Neither is it competent for us to pass upon the binding effect of the decree, upon remaindermen who claim only as voluntary beneficiaries. Story Eq. Pl., (9 Ed.) §§ 144, 145. The petition assumes that the widow was possessed of only a life estate, and that the decree was ineffectual to bind the interests of the remaindermen who were not made parties to the suit. The object of the suit is to open up the original decree of 1861, and extend its binding effect to the remainderman who was not a formal party to the proceeding. The plaintiffs in error claim to be subrogated to the rights of the lien creditors, who instituted the original proceeding, and insist on opening up the decree and enlarging its effect.

Viewed in this, its true light, I have no hesitation in holding that the petition does not contain the facts sufficient to support the equity which is invoked.

It seems to be well settled that, when one has become a purchaser in good faith under a sale which proves to be void for irregularity, and the purchase money has been applied to a satisfaction of the lien for which the sale was ordered, the purchaser becomes subrogated to the rights of the lien holder to the extent of his payment. *Valle v. Fleming*, 29 Mo. 152; *Henry v. McKerlie*, 78 Mo. 416. But the plaintiffs in error do not state a case which successfully invokes this equity. The sale at which they purchased was neither void nor irregular. The proceedings under which the sale took place, assumed to reach only the interests of parties who were made defendants, and they were effectual in reaching and subjecting such interest to the charge of the creditors' lien. The remaindermen provided

for in the deed of settlement were not made parties, and the decree did not assume to affect their estate. The purchasers were undoubtedly mistaken either in their construction of the deed, or in the scope and extent of the decree. They must have regarded themselves as buying something more than the life estate of the widow, for she was dead at the date of the sale, and her estate had terminated. When the proceedings are regular in all respects, and the decree is effectual in subjecting to its behests the interests and estates of all parties before the court, the principal ground upon which the purchaser is subrogated to the rights of the judgment creditor would seem to be wanting, especially in the absence of fraud. It may be that the purchasers and the judgment creditors conducting the sale were both mistaken in their opinions as to the extent and scope of the decree, which was regular in all respects, but this does not give the purchasers the right to take the place of such judgment creditors, and open up the judgment, and by the introduction of new parties extend and enlarge its effect. This would be, in substance, a new proceeding which the creditors had not regarded as necessary or proper to bring.

What rights of defense the purchasers may have, by reason of their improvements and possession, as well as purchase in good faith, I will not undertake to decide, as the merits of it do not come before us on this demurrer, which, in our opinion, was properly sustained.

The judgment is affirmed. Ewing, C., concurs. Phillips, C., not sitting, having been consulted about or connected with the subject matter in controversy.



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DOUGHERTY V. THE MISSOURI RAILROAD COMPANY, *Plaintiff*  
*in Error.*

1. **Carrier of Passengers: INJURY TO PASSENGER: CONNECTION BETWEEN INJURY AND MISCONDUCT OF CARRIER: PROOF OF.** In an action for damages against a street railway by a passenger, for an injury received in consequence of a sudden jerk of the car, it is not incumbent on the plaintiff to show affirmatively the immediate connection between the injury and the misconduct of the carrier, it appearing that the car was under the control of the carrier, or its servant, and that the accident was such as, under the ordinary course of things, would not have occurred had those who had the management of the car used proper care.
2. **Care Required of Carrier of Passengers.** While each carrier of passengers is not an insurer of their safety, it is bound to use due care and vigilance, so as to safely transport them. It must allow reasonable time for them to enter and leave its vehicle with safety, in the exercise of ordinary care, and should, also, allow reasonable time for passengers to enter and take seats, if there be any, or reasonable time for them to seize the straps furnished for passengers when standing, and while it may start before a passenger has had time to take his seat, or to secure his hold on the strap, it must exercise the utmost care when thus starting, so as not to jar or upset him.
3. **Carrier of Passengers: CARE AND NEGLIGENCE.** Care and negligence are relative terms, and the degree of caution required of carrier and passenger, is to be estimated, in a measure, by the hazard to life and limb; it is always such care and vigilance as a prudent, rational person would exercise under like circumstances.

*Error to St. Louis Court of Appeals.*

**AFFIRMED.**

*Dyer, Lee & Ellis* for plaintiff in error.

It was incumbent on plaintiff to establish, by affirmative proof, that the defendant was guilty of negligence or want of care and diligence. *Schultz v. Railroad Co.*, 36 Mo. 32; *Nolens v. Sickel*, 3 Mo. App. 300, 308; *Ward v. Andrews*, 3 Mo. App. 275; *Boland v. Railroad Co.*, 36 Mo. 84; *Harlan v. Railroad Co.*, 65 Mo. 22; *Thompson on Carriers*

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of Passengers, 195; Hutchinson on Carriers, 616, 618; *Hammack v. White*, 11 C. B. (N. S.) 594. The proof in this case is limited to the fact that the car started with a sudden jerk, but by reason of what force, or by whose direction, the record is wholly silent. The same degree of care is not required of the carriers of passengers upon street cars drawn by horses as of railroads, whose cars are drawn by steam. *Umber v. Street R. R. Co.*, 6 Rob. 327; *s. c.*, 51 N. Y. 497; *Feital v. Railroad Co.*, 109 Mass. 398; 2 Waite's Actions and Defenses, p. 71; *Curtis v. Railroad Co.*, 18 N. Y. 536; *Brehm v. Railroad Co.*, 34 Barb. 256, 268. The petition does not state a cause of action. *Lee v. Manufacturing Co.*, 6 Mo. App. 578; *Wildes v. Railroad Co.*, 29 N. Y. 325; *Railroad Co. v. Marcott*, 41 Mich. 435; *Aldener v. Railroad Co.*, 37 Ia. 264, 272; *Railroad Co. v. Keely*, 23 Ind. 138; *Railroad Co. v. Taffe*, 11 Ind. 458; *Eldridge v. Railroad Co.*, 1 Sandf. 39; *Ware v. Gay*, 11 Pick. 106.

*McComas & McKeighan* for defendant in error.

It is a duty which the carrier owes a passenger, to use the utmost care and prudence in the management of cars and vehicles, and when an accident happens, and the passenger is injured, it is for the defendant to show that it was at the time in the full discharge of its duty toward the passenger. *Stokes v. Saltonstall*, 13 Pet. 181; *Railroad Co. v. Pollard*, 22 Wall. 341; *Christie v. Griggs*, 2 Camp. 79; *Lemon v. Chanslor*, 68 Mo. 340.

PHILIPS, C.—This is an action to recover damages for personal injury. After the requisite preliminary statements, the petition avers :

“That on or about the 8th day of April, 1877, the said plaintiff, for a certain consideration and reward, agreed to be paid by him to the defendant, was a passenger on one of the said defendant's cars on said line of railroad, and was exercising reasonable care and diligence, when the said defendant, its agents, servants and employes, diregarding its



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and their duty to the plaintiff as such passenger, so carelessly, unskillfully and negligently managed and operated said car on said line, that the said plaintiff was suddenly and violently thrown down and against the side of the said car, and his left hand and arm thrown against and through one of the windows of the said car, whereby his hand was cut, bruised and lacerated, and the plaintiff states, that as the result of said carelessness, negligence, unskillfulness, and injuries, he has ever since been hurt and sick, and by reason thereof suffered, and still suffers great pain and anguish, and on account thereof, has been compelled to have, and has had his hand and a portion of his said arm amputated and cut off, whereby he has become permanently disabled," etc. These allegations were put in issue by the answer.

The trial was had before a jury. At the conclusion of plaintiff's evidence the court gave an instruction in the nature of a demurrer to the evidence, whereupon the plaintiff took a nonsuit with leave, etc. On writ of error to the court of appeals, this judgment of the circuit court was reversed. The defendant has brought the case here on writ of error to the court of appeals.

The plaintiff's evidence showed substantially, that about the 18th day of April, 1878, he and one McCreary approached defendant's street car on Olive street, in the city of St. Louis, between Fourth and Fifth street, for the purpose of taking passage to go home. The car stopped to admit them. Plaintiff boarded it a little in advance of McCreary. It was raining at the time, and plaintiff had an umbrella in his hand which he closed as he entered the car. The seats on the north side of the car were about full; on the south side there was one lady and perhaps another passenger. Plaintiff moved rapidly forward, about half way the length of the car, and was just in the act of turning around to take a seat on the south side, when the car started forward with a violent jerk, upsetting him. He dropped the umbrella to catch the strap, but failed to reach

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it. To save himself he caught or placed his left hand against the window, but his fall was so violent that his hand crashed through the window up to his shoulder. McCreary helped to extricate his arm. His hand was badly cut. He and McCreary then left the car and went to the nearest drug store and had his hand dressed. Physicians attended on him. His hand grew worse and finally had to be amputated on the 19th of July following. He knew from traveling on the cars that straps were provided for supporting passengers when standing, etc.

McCreary testified that he had reached the door of the car at the time of the sudden start; that the jerk was unusual and so violent that it threw him against the door-facing, which he caught. Neither of these parties saw the driver or the horses, and only judged that they started the car from the movement forward.

One Jarret, who had been a street car conductor and driver on this road, testified, as to the manner of managing and starting such cars. The cars have wheels and brakes. The brake is used for stopping and starting the car in conjunction with the horses pulling it. The driver is supposed to hold the brake until the car is started smoothly. The team is managed by reins, which the driver holds firmly with one hand and the brake with the other. That by care, etc., the driver so manages the team and the brake as to start the car smoothly. Physicians testified as to the treatment of plaintiff's wound, and the character of the injury, etc.

I. The opinion of the court of appeals in this case, (9 Mo. App. 478,) is a satisfactory exposition of the law as applied to the facts in evidence. It would be unnecessary repetition to review the authorities discussed.

Defendant's counsel insist that we review the opinion, because the authorities declare that the injury must result from the negligence and fault of the defendant, and it is incumbent on the plaintiff to show affirmatively the immediate connection between the injury and the misconduct of

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the carrier. The argument is, that there is no direct proof that the sudden movement of the car was occasioned by any act of the driver or team; that from aught that appears the motion may have been produced by some other agency. Without reviewing the authorities, the following proposition is clearly deducible: That where the vehicle or conveyance is shown to be under the control, or management of the carrier or his servants, "and the accident is such as, under an ordinary course of things, does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. *Scott v. Dock Co.*, 10 Jur. (N. S.) 1108; *Briggs v. Oliver*, 4 Hurl. & Col. 407; *Mullen v. St. John*, 57 N. Y. 568, 569.

The car in question was under the exclusive management of the defendant. The team and the brake were the motive power, and these were under, or should have been under, the control of the driver. By proper, or ordinary, vigilance, and management of this brake and team, the car would not have started with such violence as shown by the evidence. If the movement came from the team "under an ordinary course of things" the jerking would not, probably have happened, "if those who had the management had used proper care." The evidence showed that the motion was forward. Presumably, therefore, it came from the action of the motive power, the brake and the team. Presumptions arise on the usual and natural course of things. One of the chief grounds of evidence "is the known and experienced connection between collateral facts and circumstances satisfactorily proved, and the fact in controversy." 1 Greenlf. Ev. 17. As the team and the brake are the means by which a stationary car is put in motion, when the movement was forward, in the direction of that power, it is hardly reasonable to say it is merely conjectural that the motion came through the agency of the driver. Had the car been thus suddenly and violently jerked by the application of some other external force, not under

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the control of the driver, it would have been unusual and outside of the ordinary course of things. In such case it would certainly be reasonable to require the defendant to show such fact, so peculiarly within its knowledge.

It is said by the court in *Briggs v. Oliver, supra*: "Packing cases carefully placed in a proper position do not naturally tumble down of their own accord, and we have no right to assume that the fall of this packing was caused by the act of some one who was not the defendant's servant."

In *Mullen v. St. John, supra*, the court say: "Buildings properly constructed do not fall without adequate cause. If there be no tempest prevailing, or no external violence of any kind, the fair presumption is, that the fall occurred through adequate causes, such as the ruinous condition of the building, which could scarcely have escaped the observation of the owner. The mind is thus led to a presumption of negligence on his part, which may, of course, be rebutted."

So here, the natural presumption is, that when the car started suddenly forward, it was put in motion by the driver, who had control of the motive power; and in the absence of proof that the movement was produced by some extraordinary cause, not within the control of the driver, or which he could not have prevented by the exercise of due care and vigilance, the plaintiff was entitled to a verdict.

II. With respect to the obligation of the defendant to the plaintiff as a passenger, it is sufficient to say, that while it is not an insurer of the safety of passengers, it is bound by its office, as such carrier, to exercise due care and vigilance, so as to safely transport them. It must allow reasonable time for passengers to enter and leave its car with safety, in the exercise of ordinary care. It should allow the passengers reasonable time to enter and take a seat, if there be one, or reasonable time to seize the straps furnished for passengers when standing; and while it may start its car

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before the passenger has had time to take a seat, or secure his hold on the strap, it must exercise the utmost care in starting so as not to jar or upset him

III. Counsel call our attention to some authorities to support the proposition that carriers of passengers by street cars, are not bound to the same degree of care as carriers by steam. Care and negligence are relative terms. The degree of caution, both by carrier and passenger, is to be estimated in a measure, by the hazard to life and limb. It is always such care and vigilance as a prudent, rational person would exercise under like circumstances. *Flynn v. Railroad*, 78 Mo. 195.

IV. It is not necessary to decide whether the petition in question would be liable to demurrer. It is amply sufficient to support a verdict for the plaintiff on issue joined.

The judgment of the court of appeals is affirmed and cause remanded accordingly. All concur.

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JOHNSON, Appellant, v. JOHNSON et al.

1. **Mortgage, Incident to note given to secure.** A mortgage given to secure a note is regarded as incident thereto, and passes with such note to every holder at the time he receives it, without any transfer or assignment, distinct or separate from the paper the mortgage is given to secure.
2. **Mortgage: LIMITATION, STATUTE OF.** The mortgage ceases to exist as soon as the debt, it is given to secure, is paid, but so long as the debt is kept alive, the mortgage lien remains in full force, and any acknowledgment or promise of the debtor sufficient to prevent the statute of limitations from running against the debt, equally prevents the statutes from running upon the mortgage.
3. **Limitations: MORTGAGE: REVIVOR OF DEBT.** When the bar of the statute of limitations is complete, any act of the mortgageor which revives the debt, also revives the lien of the mortgage, unless the parties agree otherwise, or unless such revivor affects the rights of purchasers and mortgagees acquiring title after the bar is complete, and before the act of revivor.



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*Appeal from Lafayette Circuit Court.*—HON. WM. T. WOOD,  
Judge.

REVERSED.

*J. D. Shewalter* for appellant.

A suit may be brought to foreclose a mortgage, although the debt secured thereby is barred by the statute of limitations; after the lapse of ten years there is a presumption of payment only, but this presumption may be repelled by proof of non-payment. *Chouteau v. Burlando*, 20 Mo. 482. A note may be barred by limitation and yet the mortgage securing it may be enforced against the land. *Cape Girardeau v. Harbison*, 58 Mo. 90. There was a recognition of the mortgage within ten years which repels the presumption of payment. *McNair v. Lot*, 34 Mo. 285. The statute of limitations is inapplicable, because the replication set up a new promise in writing which the proof sustained.

*Alexander Graves* for respondent.

MARTIN, C.—This was a suit to foreclose a mortgage, and was commenced July 14th, 1880. The debt of the mortgage was evidenced by a promissory note, dated February 11th, 1860, signed by Albert G. Johnson, as principal, and David Johnson, as surety, payable one day after date to — Ridings and Martin, in the sum of \$372.98, and bearing interest at the rate of ten per cent per annum. The mortgage was of the same date with the note, which is described therein, and is conditioned that Albert G. Johnson shall pay the note, together with all interest, according to its tenor and effect. This mortgage was executed and delivered to David Johnson, the plaintiff, by Albert G. Johnson, who was his brother, and covered forty acres of land.

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It is alleged in the petition that the plaintiff paid off the whole of this note, and that only \$442.55 have been repaid by the principal debtor, leaving a balance still due of several hundred dollars. Albert G. Johnson died March 2nd, 1880, and the suit is against his widow and daughter as heirs in respect to the land proceeded against. By death of the widow since appeal, the suit has abated as to her.

The defendants, by separate answers, make general denial of the facts of the petition, and plead the statute of limitations in defense. The plaintiff, by way of replication, alleges that Albert G. Johnson, on the 20th of March, 1871, paid on the debt the sum of \$442.55, and within ten years before commencement of suit.

After the evidence relating to the issues had been submitted, the court found in favor of defendants, on the ground, presumably, that the right of action had been barred.

There is no conflict in the testimony about the payment of the note by plaintiff. On the 26th of January, 1863, he paid \$200 to one Carrol, who was the holder of the note at that time, which payment was evidenced by an indorsement to that effect on the note, as well as by a separate receipt. Afterward, in February or March, 1863, the plaintiff paid the balance of the note, amounting to about \$300, as sworn to by an eye witness. The note was then delivered to plaintiff. It appears from the evidence that in 1871, a partial settlement, or ascertainment of mutual indebtedness took place between the two brothers. David had become indebted to Albert for the price of forty acres of land in a sum which is not precisely stated, while he held against him this note, which was still running on unpaid. It was ascertained at this settlement that after allowing Albert for the land purchased from him, he would remain indebted on the note in the sum of about \$400. David desired to have his indebtedness for the land credited on the note, and Albert wanted him to take for the balance due him, the land conveyed by the mortgage. But David was



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unwilling to do this, and expressed a desire that Albert should go on and live on it. Albert declined to allow the indebtedness of David to be credited on the note, but requested a separate note from him for the amount, so that each would hold a note against the other in the full amount of his claim.

This was done by David executing and delivering a note for his indebtedness, and retaining the note in the mortgage as a demand against his brother and the land securing it. No credit on the note was entered, and no written memorandum of the transaction appears in evidence. No further payments, or recognition of the note appear, till long afterward in January, 1880. Albert was then subject to the illness which terminated in his death. David visited him with the view of obtaining a settlement of their mutual demands, taking along with him a Mr. Satterfield, who assisted at the settlement. According to the terms of this settlement, the note of David to Albert was produced by Albert, and it was agreed that it should be credited on the mortgage note, as of March 20th, 1871. The amount was ascertained to be \$442.55. Accordingly the following memorandum was indorsed on the note and signed by Albert:

“March 20th, 1871.

Received on the within note \$442.55. This credit of March 20th, 1871, includes the above erased credit and all other payments ever made by me on the within note.

ALBERT G. JOHNSON.

Attest: HENRY GOLDKILLER.”

This settlement was effected, and the memorandum made in January, 1880. The note held against David was delivered up and destroyed after the credit was entered. The \$200 credit appearing upon the note as of January 26th, 1863, was erased because it was a credit to which Albert was not entitled, it having been paid by David to the holder of the note, when he was discharging his obligation as surety. The signature of Albert was witnessed by Mr.

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Goldkiller who came in before the settlement terminated. Albert died about three weeks after the settlement. There is nothing in the evidence to impeach the good faith and reasonableness of this settlement. The brothers held opposing demands against each other, which the indulgence, incident to kinship, had permitted to remain unsatisfied for a long time. And, although the debt and mortgage lien may have been barred by the statute of limitations, the moral obligation to repay remained, and there was nothing unreasonable in the movement of the plaintiff to obtain a settlement with his brother, in view of his expected decease.

The single question for us to determine is, whether this settlement and written evidence of it, are sufficient to take the mortgage lien out of the operation of the statute of limitations. If it was, then the action of the court in rendering judgment against the plaintiff will have to be reversed.

The point as to the character of facts sufficient to keep the mortgage lien alive after the obligation is barred, for which the mortgage was given, need not be considered in this case, for the reason that the same limitation of ten years applies to both, and no evidence of acknowledgment bears upon the mortgage except as incidental to the note. The plaintiff as surety of the mortgageor, having paid the note to the legal holder, became subrogated to his rights as the legal owner thereof, and as such he was entitled to the security contained in the mortgage, which had been delivered to him to secure this identical note. *Allen v. Dermott*, 80 Mo. 56.

Under our statute a promissory note is barred in ten years. The running of the statute is suspended and its bar overcome by evidence of a part payment of it, or a written acknowledgment of it within ten years before suit. It has been decided that part payment on a note, after the bar of the statute has become complete, will revive the cause of action upon it. *Shannon v. Austin*, 67 Mo. 485. Of course

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a written acknowledgment of the obligation of the note would have the same effect. Under our decisions, a mortgage given to secure a note is regarded as incident to the note, and passes with it to every holder at the time he receives it, without any transfer or assignment, distinct or separate from the paper it is given to secure. It, also, ceases to exist as soon as the debt is paid. *McQuie v Peay*, 58 Mo. 56; *Kansas City S. A. v. Mastin*, 61 Mo. 435; *Christian v. Newberry*, 61 Mo. 446; *Pickett v. Jones*, 63 Mo. 195; *Adair v. Adair*, 78 Mo. 630. From this it follows as a natural consequence that, "so long as a debt which a mortgage is given to secure is kept on foot, the mortgage lien remains in full force. Therefore, any acknowledgment or promise of the debtor sufficient to prevent the statute from running against the debt, equally prevents the statute from running upon the mortgage." Wood on Limitations, 460.

When the bar of the statute is complete, any act of the mortgageor which revives the debt, also revives the lien of the mortgage, unless the parties agree otherwise. *N. Y. Life Ins. and Trust Co. v. Covert*, 29 Barb. 435; *Schmucker v. Sibert*, 18 Kansas 104. Such acts are always binding between the mortgageor and mortgagee. 2 Jones on Mortgages, § 1202 (3 Ed). A well defined limitation of this rule excepts from its effect the rights of purchasers and mortgagees, acquiring title after the bar is complete, and before the acts of revivor. Such is not the case before us. The question arises between the mortgagee and the heirs of the mortgageor, who must take his estate subject to the burdens he left upon it.

Measured by these principles, the lien of the mortgage in suit must be regarded as still in force when the suit was commenced, July 14th, 1880, for two reasons.

1st. In January, 1880, a credit of \$442.55 was entered upon this note in the presence of the mortgageor, and with his consent, which is evidenced by witnesses and by his signature. There was nothing fictitious about this credit. It represented a note of the mortgagee, which was surren-

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dered to him by the mortgageor, and which was not barred by the statute of limitations, as it was executed in 1871. *Phillips v. Mahan*, 52 Mo. 197. The fact that this payment in 1880 was entered upon the note as in 1871, when the plaintiff in his settlement of that date wanted it entered, does not affect the conclusion. The actual time of the payment, and the time imputed to it by both parties, were both within ten years before suit.

2nd. The memorandum indorsed on the note in 1880 is in substance, a written admission or declaration by the mortgageor that, within ten years, he had paid \$442.55 on the note as a subsisting obligation, and that he had never at any time paid any more upon it. The only inference implied from this declaration is, that the balance of the note remained as valid an obligation against him as the part he admitted to be valid by paying the same. The obvious meaning and import of the declaration, as placed upon the outstanding instrument, was to indicate how much had been paid and how much remained to be paid as a subsisting debt.

The judgment is reversed and the cause remanded with directions to calculate the interest due on the note, treating the credit thereon as of the date affixed to it, and to render decree of foreclosure for the amount found due. All concur.

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CHILDs, *Plaintiff in Error*, v. THOMPSON.

1. **Transfer of Interest in Suit; SUBSTITUTION: STATUTE.** Under Revised Statutes 1879, section 3671, a party who has transferred his interest in a pending suit, and presents the petition of his transferee, asking the substitution of the latter in his stead as said party, is entitled to have such substitution made, and if the trial court refuses to order the substitution, the record not disclosing the ground of its action, the cause will be reversed.

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2. **Instruction.** An instruction in this case asked by plaintiff as to his title, and the defense of the Statute of Limitations, approved.

*Appeal from Linn Circuit Court.*—HON. E. J. BROADBUSH,  
Judge.

REVERSED.

*S. P. Huston* for plaintiff in error.

The motion to substitute C. H. and L. Bull should have been sustained, and the action of the court in that regard was manifest error. Defendant did not make out a case of adverse possession. *Lynde v. Williams*, 68 Mo. 360; *Brown v. King*, 5 Met. 173; *Musick v. Barney*, 49 Mo. 464; *Turner v. Hall*, 60 Mo. 271; *Norfleet v. Hutchins*, 68 Mo. 597; *Harrison v. Cachelin*, 35 Mo. 79; 23 Mo. 117; 27 Mo. 26.

*A. W. Mullins* for defendant in error.

The court did not err in overruling the motion made to substitute C. H. and L. Bull as plaintiffs. Revised Statutes, section 3671, is not mandatory—whether or not the substitution will be ordered, rests within the discretion of the court. Green and Myer's Mo. Prac., §§ 760, 765; 11 How. Prac. 380; 5 Duer 607; 1 Bosw. 571. The suit was begun by Shaw May 15th, 1874, and, therefore, as to him, the statute of limitations had run for more than two years, and it being military bounty land, the action was barred, and the defendant had the complete title. R. S. 1879, § 3219; *Cooper v. Ord*, 60 Mo. 420.

EWING, C.—This was a suit in ejectment commenced in the Linn circuit court by Southworth Shaw, as plaintiff, and against Thompson, the defendant. Afterward a change of venue was awarded to Livingston circuit court. The plaintiff, Shaw, conveyed the land to Sallie Childs and died, and the suit was revived in the name of Sallie Childs as plaintiff.



On the trial the plaintiff read in evidence a patent from the United States to one Jacob Harwood, and deeds from him through several grantees to the plaintiff, Sallie Childs.

The defendant read first a tax deed from the State to David Prewett, dated in 1830, and then conveyances through numerous parties to the defendant, Thompson. These deeds were offered as color of title. Defendant then offered evidence tending to show that he and his grantors had been in the adverse possession of the land for more than ten years. Defendant then offered in evidence a certified copy of the record of a deed from Sallie A. Childs, the plaintiff, to Charles H. and Lorenzo Bull, conveying to them the land in controversy.

After rebutting evidence by the plaintiff, Charles H. and Lorenzo Bull filed their petition, alleging that after the commencement of the suit, the original plaintiff Southworth Shaw had conveyed the land in controversy to Sallie Childs, and that on February 26th, 1876, Sallie Childs had conveyed it to the petitioners, who were then the owners, and praying to be substituted as parties plaintiff to said suit, which was overruled by the court, and to which plaintiff objected and excepted.

I. Section 3671, Revised Statutes 1879, provides that when any interest in a pending action is transferred, "the party to whom the transfer is made, shall be required by the court, upon application of the party who made the transfer, either to give such indemnity or to cause himself to be substituted in the action," etc. Here the party who made the transfer, the plaintiff, Sallie Childs, through her attorney, presents to the court the petition of the parties to whom the transfer was made, to-wit, Charles H. and Lorenzo Bull, asking that they be substituted as plaintiffs. This the court refused to do, but rejected the petition and overruled the application. It does not appear why this proposed substitution was rejected, and, as far the record discloses, this was such error as will reverse the judgment.

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The statute requires in such cases, that indemnity be made or the transferee be substituted as party plaintiff; neither was done, although application therefor was made. *Cutter v. Waddingham*, 33 Mo. 269; *Smith v. Phelps*, 74 Mo. 598.

II. All the instructions asked by both plaintiff and defendant were refused. They presented the question of adverse possession, and were properly refused, except the first asked by plaintiff, which should have been given, after first substituting Bull as party plaintiff. This instruction is as follows:

1. The court declares the law to be, that the original patent from the United States to Jacob Harwood, dated the 24th day of April, 1819, the deed from Jacob Harwood to Benjamin Shirliff, dated the 13th day of November, 1819, the deed from Benjamin Shirliff to Southworth Shaw, dated February 12th, 1844, the deed from Southworth Shaw to Sallie Childs, dated the 11th day of November, 1874, and the deed from Sallie Childs to Lorenzo Bull and Chas. H. Bull, dated the 26th day of February, 1876, all of which have been read in evidence, conveyed to and vested in the said Lorenzo and C. H. Bull, the legal paper title to the premises in controversy, and the finding should be for the plaintiff unless the court is satisfied by a preponderance of the testimony, that the defendant, and those under whom he claims have held the actual possession of some part of the tract under color of title to the whole tract adversely, notoriously and continuously for some period of ten consecutive years, after the 2nd day of February, 1847, and before the 15th day of May, 1874, if such possession was commenced prior to the 1st day of August, 1866, and if commenced after the said 1st day of August, 1866, then, that he and those under whom he claims, have had such actual, open, notorious and continuous adverse possession for two whole years next before the 15th day of May, 1874.

It is proper to remark that the answer alleges the fact to be that, the land sued for is military bounty land, and comes within the statute in relation thereto.



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For refusing to substitute Bull as plaintiff upon application, and for refusing the first instruction above set out, the judgment of the circuit court is reversed and the cause remanded. All concur.

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THE UNION SAVINGS ASSOCIATION v. THE ST. LOUIS GRAIN  
ELEVATOR COMPANY, *Appellant*.

**Warehouse Receipts:** STATUTE. A negotiable warehouse receipt, within the meaning of Revised Statutes of 1879, chapter 11, is one given for goods stored or deposited. An instrument which imports no obligation to hold the grain in store, but is, in effect, an agreement to ship it, is not a warehouse receipt within the meaning of the Statute.

*Appeal from St. Louis Court of Appeals.*

REVERSED.

*Broadhead & Haussler* for appellant.

The paper offered in evidence, and which is the basis of plaintiff's claim of title to the property in question, is not a warehouse receipt within the meaning of our statute on the subject. R. S., §§ 558, 559; *State v. Miller*, 45 Mo. 499; *Farmer v. Gregory*, 78 Ky. 475; Byles on Bills, p. 95; *Nat. B'k v. Gay*, 63 Mo. 33. The paper on its face conveyed to plaintiff clear notice of its *ad interim* function. *Van Schoonhoven v. Curly*, 86 N. Y. 187. Plaintiff held the paper subject to all existing and prior equities. *Kellogg v. Schnaake*, 56 Mo. 136; *Davis v. Carson*, 69 Mo. 610; *Logan v. Smith*, 62 Mo. 458; *Brainerd v. Reaves*, 2 Mo. App. 493. The plaintiff cannot recover in this action from defendant the value of the property mentioned in the paper sued on, as it unquestionably appears from the evidence that the plaintiff theretofore received the full value and

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proceeds of the identical property under the bill of lading issued for said property to Stein & Co., and delivered to plaintiff in pursuance of the obligation of defendant expressed in the paper sued upon. *Bank v. Boyce*, 78 Ky. 42; *Nelson v. Brown*, 53 Ia. 555; *Harris v. Bradley*, 2 Dill. 284; *Bank v. Walldridge*, 19 Ohio St. 419; *State v. Fitzpatrick* 64 Mo. 185; *Williams v. Evans*, 39 Mo. 205.

*Charles A. Pearce* for respondent.

The theory of the plaintiff in this cause is: 1. That the receipt offered in evidence is negotiable by written indorsement and delivery, in the same manner as bills of exchange and promissory notes, and on delivery so indorsed the transferee is vested with the title of the property. Secs. 558, 559, R. S. 1879, p. 88; *Central Savings Bank v. Garrison*, 2 Mo. App. 58; *Harris v. Bradley*, 2 Dill. 284; *Price v. Ins. Co.*, 43 Wis. 281 *et seq.* And the negotiation of the receipt by Stein & Co. cut off the defenses which defendant might have had against the bailors, and made the plaintiff subject only to the facts stated in the receipt. *Greenbaum v. Megibbon*, 10 Bush (Ky.) 419; *First National Bank v. Boyce*, 10 Law Jour. 238. 2. That the defendant was prohibited by statute from issuing any receipt or other voucher to any person purporting to be the owner, etc., thereof, for any goods, merchandise or grain, unless the same shall have been actually received into store or upon defendant's premises, and be in the store or upon its premises and under its control at the time of issuing such receipt, and that, therefore, defendant is estopped from showing, or attempting to show, that said grain was not actually received. St. Mo., p. 87, § 553; *McNeil v. Hill*, Wool. C. C. R. 96; *Griswold v. Haven*, 25 N. Y. 596; *Goodwin v. Scannell*, 6 Cal. 541. 3. That the defendant was prohibited by statute from issuing any second receipt for said grain while a former receipt was outstanding and uncanceled without writing across the face of the same "duplicate," and the issuing of a second

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receipt is no defense to this action, but contrary-wise, is a violation of the law, rendering defendant liable. St. Mo., p. 87, § 555. 4. That no matter whether said grain was received from Stein & Co. for storing, shipping, grinding, manufacturing or other purpose, the defendant was prohibited by statute from shipping, transferring or in any manner removing said grain, and from permitting it to be shipped, transferred or removed beyond its, defendant's, control, (the receipt for the same herein sued on having been given,) without the written assent of the plaintiff holding said receipt; and *prima facie*, the receipt issued and herein concerned, was one for storage. St. Mo., p. 87, § 356; *Gibson v. Stevens*, 8 How. 384; *Cochran v. Rippey*, 6 Law Jour. 88. 5. That no printed or written conditions, clauses or provisions inserted in or attached to said receipt, herein concerned, in any way limits the negotiability, or affects the negotiation thereof or in any manner impairs the rights and duties of the parties thereto, or persons interested therein, and every such condition, clause or provision purporting to limit or affect the rights, duties or liabilities created or declared "in this act," are void and of no effect. St. Mo., p. 88, § 558. 6. That this receipt being issued to Stein & Co., and by them indorsed and delivered for value to plaintiff, the plaintiff became, by operation of law, the owner of said grain, and defendant was prohibited from delivering it to any person whomsoever, except on the surrender and cancellation of said receipt. St. Mo., p. 88, § 559. 7. That the defendant having violated these provisions of the statute, is thereby rendered liable to plaintiff in all damages, immediate and consequential, which plaintiff has suffered by reason of such violation, and the court erred in excluding testimony on the subject of consequential damages. St. Mo., p. 89, § 560.

HENRY, J.—Prior to the 31st of January, 1880, Stein & Co. had stored with defendant 5,921 45-56 bushels of No. 2 white-mixed corn, and on that day they delivered to de-

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defendant its warehouse receipts for the same and received instead the following paper:

"ST. LOUIS, January 31st, 1880.

Received of G. A. Stein & Co. five thousand nine hundred and twenty-one 45-56 bushels of No. 2 white-mixed corn, to be loaded into sacks, tickets for which when loaded, will be sent down promptly.

D. P. SLATTERY,  
Superintendent and Secretary.

Per OWEN.

5,921 45-56 bushels."

On this as collateral security, Stein & Co. procured a loan of \$3,400 from plaintiff, which, on the 30th of June, and again on the 1st of July, 1880, made ineffectual demands of the corn of defendant, and thereupon commenced this action. If the paper sued on is a warehouse receipt, within the meaning of sections 558 and 559 of the Revised Statutes, the judgment of the court of appeals must be affirmed, otherwise reversed. Those sections read as follows:

All receipts issued or given by any warehouseman, or other person or firm, and all bills of lading, transportation receipts, and contracts of affreightment, issued or given by any person, boat, railroad or transportation or transfer company, for goods, wares, merchandise, grain, flour, or other produce, shall be and are, hereby made negotiable by written indorsement thereon, and delivery in the same manner as bills of exchange and promissory notes; and no printed or written conditions, clauses or provisions inserted in or attached to any such receipts, bills of lading, or contracts, shall in any way limit the negotiability or affect any negotiation thereof, nor in any manner impair the right and duties of the parties thereto, or persons interested therein; and every such condition, clause or provision purporting to limit or affect the rights, duties, or liabilities created or declared in this act, shall be void, and of no force or effect. 1. R. S. § 558.

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Warehouse receipts given by any warehouseman, wharfinger, or other person or firm, for any goods, wares, merchandise, grain, flour, or other produce or commodity, stored or deposited, and all bills of lading and transportation receipts of every kind, given by any carrier, boat, vessel, railroad, transportation or transfer company, may be transferred by indorsement in writing thereon, and the delivery thereof so indorsed; and any and all persons to whom the same may be so transferred, shall be deemed and held to be the owner of such goods, wares, merchandise, grain, flour or other produce or commodity, so far as to give validity to any pledge, lien or transfer, given, made or created thereby, as on the faith thereof, and no property so stored or deposited, as specified in such bills of lading or receipts, shall be delivered, except on surrender and cancellation of such receipts and bills of lading, provided, however, that all such receipts and bills of lading, which shall have the words "not negotiable" plainly written or stamped on the face thereof, shall be exempt from the provisions of this act. 1 R. S., § 559.

It appears from the evidence, that the paper in question was not in the form of receipts given by defendant for produce stored with it. Such receipts were in the following form:

"No. 2,276; 5,000 bushels. St. Louis Grain Elevator Company, St. Louis, Mo., January 26th, 1880. Received in store from bulk 5,000 bushels of corn, inspected No. 2 white-mixed, subject only to the order hereon of Nanson, Bartholow & Co., and the surrender of the receipts and payment of charges.

J. JACKSON, President.

D. P. SLATTERY, Secretary.

Indorsed: NANSON, BARTHLOW & Co."

The difference between this receipt and that in suit, is material and significant. The effect of section 558, *supra*, is to make warehouse receipts negotiable. To understand what are such receipts as are made negotiable, sections 558



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and 559 are to be read together. Section 559 provides how receipts made negotiable by section 558 may be transferred, and the effect to be given to such transfers, and provides that "warehouse receipts given by any warehouseman \* \* \* for any goods \* \* \* grain \* \* \* stored or deposited \* \* \* may be transferred by indorsement in writing thereon, and the delivery thereof so indorsed."

A negotiable warehouse receipt, therefore, is one given for goods stored or deposited. The paper in suit is not such a receipt. It imports no obligation to hold the grain in store, but is in effect, an agreement to ship corn, as the evidence shows, then in store. On its face it gave notice that it was not a receipt for corn to be held in store, but a memorandum showing that the corn was to be shipped by defendants for the owner. If it had expressly contained the stipulations, fairly inferable from its terms, that defendant had received of Stein & Co. the corn mentioned, which defendant was, at its earliest opportunity, to load into sacks, tickets for which, when shipped, were to be sent to Stein & Co., would it be contended that any one could have purchased that paper, held it for months and after defendant in compliance with its terms had shipped all the corn, sued defendant and maintained this action? Respondent's counsel contends that the defendant was prohibited by section 553, R. S., from issuing any receipt or voucher to any person, purporting to be the owner, for any goods unless the same shall have been actually received into store or upon defendant's premises, and be there at the time of issuing the receipt, and is, therefore, estopped from showing that said grain was not actually received. No attempt was made to show that the corn was not in defendant's possession when the paper sued on was issued. It was in store but not to be kept in store for the owner, but, by the terms of the paper, to be shipped. No one taking it by indorsement could have supposed that the corn was to remain in store for a longer time than it would take to sack and ship it.

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The object of section 553 was to prevent the issuance of a receipt to one who had no property in store, thus giving him a fictitious credit. There was nothing in the transaction under consideration violative of that section or against its policy.

When Stein & Co. delivered to defendant the warehouse receipt, in order to move the corn, they were entitled to some evidence that they owned it, and a paper, such as that given them, was as little as they could ask. Under respondent's view, and that taken by the court of appeals, Stein & Co., after delivering up the warehouse receipt, had no right to any receipt or memorandum, showing that they were the owners of the corn still in the possession of the elevator company, and, therefore, by legal compulsion, must place themselves at the mercy of the latter. Sections 555 and 556 are relied upon to show that no matter for what purpose the corn was received, defendant was prohibited from shipping or placing it beyond its control without the written assent of the holder of the receipt. Section 555 prohibits the issuance by warehousemen of a second receipt for goods while a former one for the same, or any part of the goods, shall be outstanding. No receipt was outstanding when the receipt, or paper, in suit was issued.

Section 556 prohibits warehousemen from selling, shipping, \* \* any goods \* \* for which a receipt shall have been given by him, whether received for storing, shipping, \* \* or other purpose, without the written assent of the person holding such receipt.

The reason why goods received for shipment, such purpose being expressed on the face of the receipt given for them, may not be shipped, without the written assent of the holder of such receipt, is not perceived, if the section be construed to require such written assent of the original holder of the receipt, who has never parted with it. If, however, we are right in the position that the paper in suit is not a negotiable warehouse receipt, then no holder of such receipt can invoke this section of the statute, unless

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he has given notice to the warehouseman, before the shipment of the grain, that he was the owner. If such receipts pass by indorsement and delivery, and are held to be negotiable warehouse receipts, the warehouseman might have the written assent of the holder to-day, and to-morrow would have to ascertain whether he was still the holder; if not, ascertain who is, and from such holder also get a written assent to ship the goods. Such a construction would make nonsense of the section and fill the elevators with produce to remain in them until the elevator company could find the owner of the receipt and hold him fast, after getting his written assent, until the shipment had been effected, otherwise the company could never venture to ship the goods.

The paper in question was, under the evidence, neither a receipt for goods to be stored nor shipped. The corn had been received for storage, and a receipt to that effect given, had been delivered up, and the defendant ordered to ship the corn, and the paper was but a memorandum showing how the corn, on the delivery of the warehouse receipt, was delivered to the owner, section 559 providing that "no property, so stored or deposited, as specified in such \* \* \* receipt, shall be delivered, except on surrender and cancellation of such receipts. On its face it purported to be a receipt for corn to be shipped, and not being a negotiable warehouse receipt, it was competent for defendant, as against an assignee who had given no notice of his claim, to show a shipment of the corn.

I find nothing in the cases cited by the court of appeals, and in brief of counsel, in conflict with the foregoing views. *Harris v. Bradley*, 2 Dill. C. C. R. 284, is cited for the proposition that nothing in the statute requires that instruments embraced by it should be of any particular form. This is not controverted; but we hold that, while no particular form is prescribed for a warehouse receipt, it must be for goods stored, and that when such is not the character of the instrument, but, on its face it gives notice

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of the manner in, and the purpose for which the goods are held, and such holding is inconsistent with an obligation to keep them in the possession and under the control of the warehouseman, it is not a warehouse receipt within the meaning of sections 558 and 559. The case of *McCabe v. McKinstry*, 5 Dill. C. C. R. 511, 517, is relied upon to show that *prima facie* the paper in question is a receipt for storage. There the receipt was as follows:

"Received of Paul McKinstry five hundred and fifty bushels of No. 1 hard wheat, at his risk in case of fire, and free of storage until sold.

WINNEBAGO CITY MILL Co."

Judge Dillon held that "*prima facie* the receipt issued is one for storage." But even in that case he decided that parol evidence was admissible to show the character of the transaction. Upon its face it was a receipt for storage, while the paper in question upon its face contemplates shipment and not storage.

We are all agreed, except SHERWOOD, J., absent, that the judgment of the court of appeals should be and it is accordingly reversed.

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THE STATE *ex rel.* MASTIN V. McBRIDE *et al.*, Appellants.

1. **Sheriff: INDEMNIFYING BOND: CLAIMANT OF PROPERTY, WHEN NOT LIMITED TO.** In the absence of statutory prohibition, the claimant of property levied on by a sheriff, and as to which an indemnifying bond has been given the officer, is not restricted to his remedy on the bond, but may sue the sheriff for the trespass or conversion.
2. **Statute, Construction of.** The provisions of the Revised Statutes of 1879, do not prohibit such common law action against the sheriff for trespass or conversion, where an indemnifying bond has been given.
3. **Fraudulent Conveyance: EVIDENCE.** Where mines are sold under a deed of trust, and ore taken therefrom after such sale is levied

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on and sold by the sheriff under execution in favor of a judgment creditor of the grantor in the deed of trust, and the purchaser at the sale, under the trust deed, brings suit for conversion against the sheriff, it is competent for the latter to impeach the sale under the deed of trust as fraudulent and void, and to show that the mines, after the sale, were carried on by the grantor for his own use, although in the name of the purchaser, and that the ore levied on, was in truth, the property of the grantor.

*Appeal from Jasper Circuit Court.*—HON. M. G. MCGREGOR,  
Judge.

REVERSED.

*Galen Spencer and C. H. Montgomery* for appellants.

The court committed error in striking out the defense that plaintiff's remedy was restricted to an action on the indemnifying bond. *State to use, etc., v. Leutzinger*, 41 Mo. 500; *Goldsoll v. Watson*, 30 Mo. 122; *Broadley v. Holloway*, 28 Mo. 150. The court erred, also, in sustaining the objections to defendant's testimony, and in directing the jury to find for plaintiff. In questions of fraud a wide range is allowed; any fact, however slight, if at all relevant to the issue, is admissible. *Bump on Fraud. Convey.*, pp. 541, 542, 543, 544, 549, 507, 559; *Blue v. Pennison*, 27 Mo. 272. Land purchased in the name of another, may be levied on and sold under execution at the instance of any creditor, *Dunnica v. McCoy*, 24 Mo. 167. A fraudulent conveyance is void at law, as well as in equity. *Allen v. Berry*, 50 Mo. 90.

*Phelps & Brown* for respondent.

The taking of the bond by defendant did not prevent plaintiff suing the sheriff for wrongful levy. *Belkin v. Hull*, 53 Mo. 492. The court below properly excluded the testimony offered to show that the sale under the deed of trust was fraudulent, as the plaintiff had a valid title even if the sale was fraudulent, until the creditors of the North Center



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Creek Mining & Smelting Company defeated it in due course of law, and when defeated, it is not rendered void *ab initio*, but only from the time of the levy of the execution under which the property is sold. Bump on Fraud. Convey., 465. For that reason a creditor cannot levy upon property which the fraudulent grantee has converted from realty into personalty, as, for instance, plaster dug from the ground, or stone taken from a quarry. *Jones v. Bryant*, 33 N. H. 53; *Garbutt v. Smith*, 40 Barb. 22; *Pierce v. Hill*, 35 Mich. 194; Bump on Fraud. Convey., 465. The mineral levied on by the defendant in this case having all been dug from the ground after the plaintiff took possession under his purchase, it was not subject to levy on an execution against plaintiff's grantor. A sheriff cannot institute a creditor's suit to reach the proceeds of property fraudulently conveyed, and the proceeds of such sales are not subject to levy and sale on execution against the fraudulent grantor. *Lawrence v. Bank of Republic*, 35 N. Y. 320. It is conceded, if not, the evidence shows, that the zinc ore levied upon by Sheriff McBride, in this case, was not in existence at the time of the alleged fraudulent purchase or conveyance. It had at no time been the personal property of the grantor. It could not, therefore, have been subject to levy, at the time of conveyance to and purchase by relator. True, it was mined upon the land claimed to have been fraudulently conveyed, but no act of the grantors contributed in any way or part to its production, and a creditor cannot stand by and permit the fraudulent grantee to retain the lands, and yet claim the proceeds thereof produced wholly by the labor or at the expense of the grantor.

MARTIN, C.—This was an action against a sheriff and his sureties, upon his official bond, for the value of certain zinc ore, seized by him under an execution in favor of one N. M. Barney, and against the North Center Creek Mining and Smelting Company. It is alleged in the petition, that

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said sheriff seized said ore in August, 1880, and sold the same to plaintiff on the 1st day of September, 1880, as the property of said company, to the damage of plaintiff in the sum of \$2,776, who was the owner thereof at the time of the seizure and sale.

The answer consisted of a general denial of all matters not subsequently admitted. By way of special defense, it charged that the plaintiff's pretended title was in fraud of creditors, setting up the facts constituting the fraud. It is alleged that the corporation was composed of Thomas H. Mastin, John J. Mastin, Major Henning, Mrs. Henning, Amanda Toms, and one Williams, and that Thos. H. Mastin was president, and William Toms, secretary; that the company was heavily in debt, and that its mining property, of the value of \$100,000, was subject to a mortgage in favor of John Wahl & Co., of St. Louis; that the officers and directors of the company, with the intent to defraud the creditors, procured a sale of the property under the deed of trust to David C. Mastin, brother of the president, for the inadequate value or price of \$4,180; that said David C., in this purchase by him, acted as the agent for the company, accepting the property and holding it for them and to their use; that after the purchase by Mastin (D. C.) the company retained possession of the lands, mines and machinery, and took out the ore as before. It is added that at the time of the levy and sale by the sheriff, said David C., was not the owner of the zinc levied upon, nor in possession of the same, but that the company was the owner thereof, and in possession of the same. Another defense was pleaded to the effect that, after the seizure by the sheriff, the plaintiff made claim for said ore under the statute; that in response to his claim the sheriff received a good and sufficient indemnity bond from the execution creditor, by reason whereof it is claimed, that the plaintiff cannot maintain this suit, but must pursue his remedy on the said bond. On motion of the plaintiff, this defense about the acceptance and return into court of an indemnity bond was stricken out against

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the objections and exceptions of defendants. The reply of plaintiff was a general denial of the new matter contained in the answer. The case was tried by a jury. When the defendants came to their evidence the court excluded it all, except such as related to the value of the property. Then, upon the evidence as produced by plaintiff and defendants, the court instructed the jury to find for plaintiff, and their verdict was so rendered, upon which judgment was entered in the sum of the penalty of the bond, with right to execution for the damages assessed in the sum of \$2,501.16, from which the defendants appeal. It will be seen from this statement, that the record presents two questions for us to determine. One of them arises from the action of the court in striking out the portion of the answer relating to the indemnity bond; the other springs from the exclusion of the evidence offered by defendants.

It has been held in several decisions of this court, construing our execution laws, that when a claim was made and a bond furnished in response to the claim, the officer making the levy was protected against any action at the instance of the claimant, whose remedy was restricted to the bond. *State to use Goldsall v. Watson*, 30 Mo. 122; *State to use McMurray v. Doan*, 39 Mo. 44; *Bradley v. Holloway*, 28 Mo. 150; *State to use Daggett v. Loutzinger*, 41 Mo. 498. It will be found on examination of these decisions, that they were rendered in the construction of enactments which prohibited suits against the sheriff, upon said compliance with their provisions, relating to claims and indemnifying bonds. The subsequent case of *Belkin v. Hill*, 53 Mo. 492, was rendered under a statute which was wanting in any such prohibiting clause; and the court held that in the absence of express prohibition, the claimant was not restricted to his remedy on the bond, but might sue the sheriff for the trespass or conversion. This decision was in construction of the statutes of 1865, and rests upon the principle that the action against the sheriff remains in all cases, unless taken away by statute. The revision of 1879

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will have to be construed in obedience to this principle. In examining its provisions on the subject, none will be found expressly prohibiting suit against the sheriff. The next inquiry is, whether sections 2366 and 2367 impliedly prohibit the action. These provisions are new and somewhat unusual. If they, in fact, afford an adequate and complete remedy, to the claimant, the argument that they were intended to supersede all other remedies might then be entertained. But if they fail in this, then the argument that the common law action against the sheriff and his sureties is denied to the claimant by implication fails.

It will be observed that these sections contemplate two bonds after claim has been made; one by the execution creditor to indemnify the sheriff and the claimant, the other by the claimant who desires to take possession of the property upon his forthcoming obligation. It is next provided that the sheriff shall return the claim, and the bonds into court on, or before return day of the execution. The clerk is required to enter the matter upon the docket as civil cases are docketed, and it is provided, that "the matter shall, unless continued for cause, be tried at the term at which the claim is returned." The act provides for pleadings, in respect to the claim by answer, demurrer and reply. It, also, directs the nature and form of the judgments to be rendered. This is a very extraordinary addition to our execution statutes, and it might be instructive as well as interesting to know whence it came. It evidently contemplates a special suit, or proceeding upon the claim returned into court, which is made to take the place of a petition, to be answered or demurred to like any other statement of a cause of action. Viewed in this light, the question arises whether an independent action on the bond will lie while this summary proceeding remains undisposed of.

It is evident that this summary, or supplemental proceeding does not contain or furnish a remedy equivalent to the common law action which it is claimed to supersede. It declares that "if the judgment shall be in favor of the

claimant, the court shall by its order direct the officer to release such property to the claimant, and shall enter judgment for costs against the execution creditor and his sureties." If the property has not been bailed by the claimant, and the officer has gone on and sold it, as in this case, what good will the order of release and judgment for costs against the execution creditor and his sureties be to the claimant. A suit of some kind would be necessary in order to realize anything on his claim. The section goes on to say "if the judgment shall be for the execution creditor, it shall be against the claimant, and his sureties in like manner, and the court shall order the property sold, and a certified copy of such order shall be delivered to the officer, and shall have the force of, and be proceeded upon as special execution." Evidently there can be no judgment of this character in favor of the execution creditor when the claimant has furnished no forthcoming bond, and the creditor has gone on and sold the property under his execution. Indeed, the statute does not purport to make this summary remedy exclusive of all other remedies, for in section 2366 it is provided that "such bonds may be sued on at the instance of any person injured in the name of state to the use of such person for any breach of the condition of such bonds." While it thus appears that the summary, or supplemental proceeding on execution does not exclude an independent action on the bond, the right of action so permitted on the bond does not purport to be exclusive of other forms of action, and resort to it is not obligatory on the claimant. The section provides only that "such bonds may be sued on." The learned gentlemen, composing the joint committee of revision, could not have regarded these sections as excluding the right of independent action in trover or replevin; otherwise they would not have included in their notes of illustration the case of *Belkin v. Hill*, 53 Mo. 492, which sustains such right of action in the claimant, and omitted the former cases as authorities tending to support the contrary doctrine. I am satisfied that, there is no ex-



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press or implied interdiction of the common law right of action against the sheriff, in a case like the present one.

In considering the action of the court in excluding the evidence offered by defendants, it will be necessary first to notice the evidence submitted by plaintiff in support of his title. The mortgage to Wahl & Co., and the sale under it to David C. Mastin of November 24th, 1879, as well as the levy and sale under execution by the sheriff, seem to be admitted as formal facts by both sides. The plaintiff introduced William Potter as a witness, who testified that prior to March, 1878, he had been in the employment of T. H. and J. J. Mastin, in the Mastin Bank; that in March, 1878, he went into the employment of the Mining & Smelting Company referred to in the pleadings, and kept their books till August, 1878, when Mr. Wilcox took charge and he left; that after the sale to D. C. Mastin of November 24th, 1879, he in pursuance of an employment by D. C. Mastin, repaired to the mining property November 27th, 1879, in company with J. J. Mastin, formerly president of the corporation; that witness became bookkeeper and J. J. Mastin manager; that witness handled all the money, and acted at all times under the immediate direction of J. J. Mastin, who attended to the hiring and discharging of men; that witness reported part of the time to J. J. Mastin, part of the time to Thos. H. Mastin, and part of the time to D. C. Mastin; that J. J. Mastin remained at the works till May 1st, 1880, and that witness never saw D. C. Mastin at the works while he was there; that witness was present at the time of the levy and sale by the sheriff, and was in charge of the works at Webb City; that the zinc ore levied upon was the property of D. C. Mastin; that said D. C. Mastin was in possession thereof; that the mineral levied upon consisted of the last mineral taken out of the mines before they stopped working them May 1st, 1880; that the mineral levied upon had been taken out in March and April, 1880; that the mineral levied upon by the sheriff in August, 1880, was sold September 1st, 1880; that after witness

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left the works, the ground was leased to Wm. Toms by J. J. Mastin, as agent of D. C. Mastin, who was not present at the time. This was, in substance, the evidence of plaintiff on his right of property.

The defendants then offered evidence, which, they claim, tended strongly to impeach the sale under the deed of trust, as fraudulent and void, and to show that the mines were, after the sale, carried on by the company for its own use, although in the name of D. C. Mastin, and that the ore levied upon was, in truth, the property of the company. The plaintiff objected to this evidence, contending that, even though the sale under the deed of trust was fraudulent as to creditors, between the parties it would have to be treated as valid by creditors, until it was attacked by them in a proper proceeding; and that as the sheriff was not proceeding against the land, such products belonged to the purchaser at the sale, and were not subjected to execution directed against the company, which may have been a fraudulent grantor. It may be conceded that the issues and products derived from land fraudulently conveyed as to creditors, do not, as a matter of course, belong to the fraudulent grantor, if they have been derived after the conveyance. Presumably they belong to the grantee as the result of his labor and capital, which were never subject to process against the grantor. For that reason such subsequent issues and products have usually been treated as exempt from execution against the fraudulent grantor of the land. *Garbutt v. Smith*, 40 Barb. 22; *Jones v. Briant*, 13 N. H. 53; *Peters v. Light*, 76 Pa. St. 289; *Lawrence v. Bank*, 35 N. Y. 320; *Heywood v. Brooks*, 47 N. H. 231. But presumptions of this character are not conclusive. The point in issue was, whether the fraudulent grantor was in truth, interested in the subsequent issues and products of the mines. Any fact or circumstance tending to prove that the ore, lifted from the mines after the sale, belonged to the company notwithstanding the *prima facie* import of the deed of sale to the contrary would be competent evidence. There is no

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reason for holding that the creditor should be estopped in the submission of any competent evidence by a deed to which he is no party. It is clear, therefore, that if the evidence offered by defendants could have no other effect than to impeach the sale of the mines, as fraudulent, it was properly excluded, because the defendants had not levied upon the mines, nor sought to subject them in any manner to their execution. But if the evidence, tending to impeach the sale of the mines as fraudulent, was of such character and import as also to involve the actual title to the subsequent products, then it was clearly competent for the purpose for which it was offered. The sale itself, notwithstanding its outward form and solemnity, may have been effected, not only for the purpose of placing the mines beyond the reach of creditors for the secret use of the company, but for the purpose of enabling the grantor to receive and enjoy to his own use, the subsequent issues and products of the mines. In other words, the facts and circumstances attending the sale of the mines may furnish competent and convincing evidence as to the ownership of the issues and products after the sale. Such would be the case when it appears from the evidence that the sale was effected for the purpose of affording a mere cover for the subsequent use and enjoyment of the land, and receipt of its rents and issues. The defendants, in maintaining their levy upon such issues and products, ought not to be estopped, by the grantor's deed, from showing that the mines remained in the possession of the company, although apparently in the possession of another, and that they were worked with its capital and for its benefit.

In the case of *Lackland v. Garesche*, 56 Mo. 267, wherein it was attempted by garnishment process to compel the trustee of real estate to pay over the rents and profits therefrom, as belonging to the attachment debtor, it was conceded by the court that the garnishee would be answerable for such rents and profits upon proof that the conveyance, under which he received them, was fraudulent as to cred-

itors; Judge Adams remarking, "it is competent, under our statute, to summon a fraudulent assignee of property and effects and compel him to disgorge in favor of a creditor. For when such issue is found in favor of the creditor, no trust exists, and the property or effects can be delivered over without any trouble to satisfy the debt." In *Fury v. Strohecker*, 44 Mich. 337, Marston, C. J., says: "When, however, the debtor for the purpose of defrauding his creditors, makes a conveyance of his real estate, yet retains the possession, or receives the rents, issues or profits thereof in whole or in part, the mere fact that the grantee is the ostensible owner of the farm or its products, or that the crops had not been sown or planted at the time of the fraudulent conveyance, should not deprive the creditor of his right to resort to the crops, at least to the extent of the fraudulent grantor's interest therein, in satisfaction of his debt." The case of *Dodd v. Adams*, 25 Mass. 398, recognizes a broader application of the same doctrine.

It is contended by plaintiff that the evidence excluded does not tend to prove that the mines were sold, at the instance of the company, at the trustee's sale, or purchased and held by the plaintiff to the use of the company. I have examined the evidence excluded and the offers of evidence ruled upon, and I am unable to concur with the learned counsel of plaintiff in this interpretation. The positive declarations of the president were to the effect that the sale under the mortgage was at the instance of the company, that the purchase was for the company, and that the business thereafter conducted was for the company, although ostensibly in the name of D. C. Mastin. The acts of the officers and of the plaintiff himself, all tend in the same direction. D. C. Mastin was never seen at the mines after the sale, and the business thereafter was conducted under the control of J. J. Mastin, who was a director and former president of the company. Whether the sale was a cover to the secret and continued ownership of the company, as to the mines and their products, is a question for

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the jury to determine. The trial of an issue of this nature necessarily takes a wide range, and it will not do for the courts to declare that any particular instrument or paper constitutes, either in law or equity, an impregnable barricade behind which a fraudulent grantor may rest in security. The ruling of the court in this case presented an unfair result. The plaintiff, by documentary and oral evidence, was permitted to prove that the mines and the products thereof were in the possession and ownership of D. C. Mastin, while the defendants were prevented from disproving such facts, because they had not filed a bill in equity to set aside the sale as fraudulent; although, in their answer, they alleged it to be fraudulent, as against creditors, and as constituting a cover and concealment of the actual and continued ownership of the company. If such was its character, it was void at law, as well as in equity, and the court erred in preventing the defendants from establishing its fraudulent character and use, if able to do so.

The judgment is reversed and the cause remanded.  
All concur.

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HOLTON *et al.* v. TOWNER *et al.*, *Plaintiffs in Error.*

1. **Judgment against a Married Woman and Others sui juris:** NOT VOID AS TO LATTER. A judgment rendered jointly against a married woman and others who are *sui juris* is not, as to the latter, void and collaterally assailable, although as to the married woman, it is a nullity, and although it is, also, an entirety for the purposes of review on appeal or writ of error, and would be reversed as to all the defendants, if thus directly assailed.
2. **Infant:** APPEARANCE BY ATTORNEY. A judgment will not be reversed because an infant appeared to the action by an attorney, where the judgment is in his favor. R. S. § 3582.



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*Appeal from Linn Circuit Court.*—HON. S. P. HUSTON,  
Special Judge.

REVERSED.

*A. W. Mullins* for plaintiffs in error.

The court erred in admitting in evidence the deed of John S. G. Burt from William W. Gitt; said deed was not the act and deed of Joseph Jay by Gitt, as attorney in fact, but it is the deed of Gitt. Story on Agency, (5 Ed.) 148, and note; *Endsley v. Strock*, 50 Mo. 508; *Bobb v. Barnum*, 59 Mo. 394. The application for and appointment of Frank L. Binford next friend to Thomas J. Holton during the progress of the trial, were irregular and unauthorized by law. The sheriff's deed to defendant Towner, and the judgment offered in connection therewith, should have been admitted in evidence. The deed is formal, and the judgment recited in it, although some of the defendants were married women, was not void. The judgment may have been erroneous and reversible for error, but unless it was absolutely void, the sale of the land under it and its purchase by Towner and the sheriff's deed vested in him the title as against the judgment defendants. *Hoskinson v. Adkins*, 77 Mo. 537; *Lenox v. Clarke*, 52 Mo. 115. The judgment against Thomas J. Holton, Jr., although a minor, and no guardian was appointed, was not void. *Jeffries v. Robideaux*, 3 Mo. 33; *Fulbright v. Cannefax*, 30 Mo. 435; *Gott v. Powell*, 41 Mo. 416; *Townsend v. Cox*, 45 Mo. 401. Plaintiffs' possession was insufficient to authorize a recovery. *Bledsoe v. Simms*, 53 Mo. 305; *Dunn v. Miller*, 75 Mo. 260; *Crockett v. Morrison*, 11 Mo. 3.

*C. L. Dobson* for defendants in error.

The infant plaintiff, Thos. J. Holton, Jr., having recovered judgment in the court below, no advantage can be taken of his having appeared by attorney in seeking the

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appointment of a next friend. 2 Wag. Stat., § 19, p. 1036; R. S., § 3582; *Robinson v. Hood*, 67 Mo. 660. Besides, the disability of infancy is now removed. He is of full age and appearing by attorney in this court. He is now twenty-three years old. The evidence tended to prove prior possession in the plaintiffs, and the finding of the court below, under the instructions given, was a finding of that question of fact in plaintiffs' favor, and is not subject to review in this court on that point.

The evidence offered by defendant shows that plaintiffs and defendants claim under the same source of title, and, therefore, the only question presented to this court is the correctness of the ruling of the court below in excluding the sheriff's deed and judgment offered by defendants. This deed and judgment were treated by the circuit court as nullities, because they showed upon their face that the defendants in error, Susan M. Walker, Maria M. Clark and Julia M. Fisher, were all married women at the time of the rendition of the judgment. The evidence of James W. Walker, read by plaintiffs, proved the same thing. For this reason the judgment and deed are nullities. *Corregan v. Bell*, 73 Mo. 53; *Hargadine v. Van Horn*, 72 Mo. 370; *Robinson v. Hood*, 67 Mo. 660; *Jackson v. Bowles*, 67 Mo. 609; *Weil v. Simmons*, 66 Mo. 617; *Gage v. Gates*, 62 Mo. 412; *Wernicke v. Wood*, 58 Mo. 352; *Lincoln v. Rowe*, 64 Mo. 138; *Higgins v. Peltzer*, 49 Mo. 152; *Covenant Ins. Co. v. Clover*, 36 Mo. 392. A judgment at law against a married woman, is not an irregularity. *Jones v. Hart*, 60 Mo. 356; *Tidd's Prac.*, 512, 513. It is absolutely void. *Fithian v. Monks*, 43 Mo. 502, and authorities cited. The judgment being void as to the married women who were sued, it is void as to all. The judgment is an entirety. *Covenant Ins. Co. v. Clover*, 36 Mo. 392; *Freeman on Judg.*, § 136; *Hulett v. Nugent*, 71 Mo. 131; *Green v. St. Clair*, 52 Mo. 327; *Smith v. Rollins*, 25 Mo. 411; *Rush v. Rush*, 19 Mo. 441. A judgment erroneous as to one or more defendants, and not as to others, cannot be reversed in part and affirmed in

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part. It must be reversed or affirmed as to all. By what rule can a judgment absolutely void as to three defendants, be held valid as to one or more others? The judgment offered in evidence by defendants, and recited in the sheriff's deed, was against the three married daughters of Thomas J. Holton, deceased—Mrs. Walker, Mrs. Clark and Mrs. Fisher—his widow, Sabina B. Holton, and one Elijah H. Holton. The two latter are not parties to this suit. Elijah H. Holton does not appear to have had any interest in the land in controversy. So the only persons in any wise interested in the land against whom the court had any power to render a judgment at law, under any circumstances, were the widow, Sabina B. Holton, and the minor, Thos. J. Holton, Jr. But the dower interest of the widow in the real estate in controversy, being unassigned, was not subject to levy and sale either under attachment or execution.

HOUGH, C. J.—This is an action of ejectment to recover the possession of the northwest quarter of the southwest quarter, and the south half of the southwest quarter of section 2, township 57, range 18, in Linn county. The petition is in the usual form. The answer contains, first a general denial, second, an allegation that one of the plaintiffs, Thos. J. Holton, is a minor, under the age of twenty-one years, and has no legal capacity to sue; and third, that the defendant, Towner, had acquired, by sheriff's deed, the plaintiffs' title to the land in question.

The plaintiffs introduced in evidence a patent from the United States to Joseph Jay for the land in question, and sundry mesne conveyances, through which they attempted to establish title in Joseph J. Holton, who died in 1859, leaving the plaintiffs, with the exception of the husbands of the female plaintiffs, as his heirs at law. It appears from the testimony, that in 1859, Thomas J. Holton rented the land to one Cash; that in 1867 one of the plaintiffs erected a house on the land which was rented for the plaintiffs by an agent until 1871 or 1872, when one Love took possession,

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claiming under some pretended title. It further appears that Love was put out of possession in 1875 or 1876 by the plaintiffs through some proceeding instituted by them to recover the possession, and that no one occupied the land thereafter until Towner, the defendant, took possession. He put a tenant in the house, and fenced a large part of the land. The precise date, when Towner went in, is not shown. This suit was instituted in October, 1877; the ouster of the plaintiffs is laid in June, 1877, and the defendants were shown to have been in possession at the institution of the suit. It also appears that Thomas J. Holton paid taxes on the land from 1846 or 1847, until his death in 1859, and thereafter, and up to the time of trial, the plaintiffs paid taxes. The defendants offered in evidence a deed from the sheriff of Linn county to the defendant, Towner, for the land in question which was dated on June 7th, 1877, and recites that, "on the 13th day of December, 1876, judgment was rendered in the circuit court of Linn county and State of Missouri, in favor of John Nutter and against Sabina B. Holton, Elijah H. Holton, J. W. Walker and Susan M. Walker, his wife, Martha M. Clark and A. D. Clark, her husband, Thomas J. Holton, Julia M. Fisher and Robert J. Fisher, her husband, for \$124.10 for debt" and for costs; that an execution was issued on said judgment, March 3rd, 1877, which was levied by the sheriff on the land in question, March 10th, 1877, and at the June term, 1877, of the circuit court of Linn county, under and in pursuance of said execution and levy, and notice of sale duly given, the said land was sold by the sheriff and the defendant, Towner, was the purchaser at and for the price and sum of \$75.00.

The following judgment, in said deed recited, was also offered in evidence. "John Nutter, plaintiff, against Sabina B. Holton, Elijah H. Holton, J. W. Walker and Susan Walker, his wife, Martha M. Clark and A. D. S. Clark, her husband, and Thomas J. Holton, Julia M. Fisher and Robert J. Fisher, her husband, defendants.

Now at this day comes the plaintiff by his attorney, and the defendants, although summoned by publication in all things according to law, an interlocutory judgment having been rendered herein at the last term of the court, and the defendants still failing to appear, and the suit of the plaintiff being founded upon an instrument of writing and the amount of plaintiff's demand ascertained by said instrument, the court doth assess the amount due by the defendants to the sum of \$124.10. Wherefore, it is considered and adjudged by the court, that the plaintiff recover of the said defendants \$124.10 and his costs in this behalf expended, and that he have execution against the real estate attached in this suit, to-wit: The west half of the southwest quarter, and the southeast quarter of the southwest quarter, of section two (2), and the southwest quarter of section twenty (20), all in township fifty-seven (57), of range eighteen (18), in Linn county, Missouri." Which judgment was rendered in the circuit court of Linn county, December 13th, 1876.

The deed and judgment were, on the objection of the plaintiffs, excluded by the court. After the testimony was all in, on the application of the attorney for the plaintiffs, and against the objections of the defendants, a next friend was appointed for Thomas J. Holton, Jr., one of the plaintiffs, to further prosecute the suit in his behalf. The court ruled that the paper title of the plaintiffs was defective, but held that as they had prior possession under color of title and claim of the fee, they were entitled to recover and judgment was rendered accordingly. It is unnecessary to notice the objections to the several conveyances in the plaintiffs' chain of title, as they base their right to a recovery on prior possession, and the paper title offered by them is certainly admissible as color of title. Besides, it is doubtful whether the defendants can be heard, here, to question the validity of the plaintiffs' title after having offered testimony for the purpose of showing that they are entitled to possession by reason of having acquired their title at execution



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sale. *Fugate v. Pierce*, 49 Mo. 441. Under the rule laid down in that case, they might have been compelled at the trial to elect between this plea, denying the plaintiffs' title, and the plea alleging that they had acquired the same; and having offered to show that they had acquired the plaintiffs' title, they might be regarded as having abandoned their plea denying the plaintiffs' title. *Vide Wilcoxon v. Osborn*, 77 Mo. 621; *Brown v. Brown*, 45 Mo. 412.

We understand the deed and judgment to have been excluded by the court below, on the ground that the judgment was a nullity. In this ruling, we are of opinion that, the court erred. It has been repeatedly decided by this court that a personal judgment, such as appears in this case, against a married woman is a nullity. But the judgment is also against other parties, who are *sui juris*; and while this judgment is an entirety for the purposes of review, on appeal or writ of error, and would be reversed as to all the defendants, if directly assailed, because the court erred in rendering a judgment against the married women, which it had no power to render, and which was, therefore, as to them a nullity, it does not follow that such judgment is also to be regarded as of no validity whatever, as to the other defendants, when collaterally assailed. We are aware that it has been often stated in general terms that a judgment at law, when void as to one is void as to all. But this language is not entirely accurate when the judgment is against parties who are severally liable. All contracts in this State which were joint at common law, are declared by statute to be joint and several, and the judgment offered in evidence is based upon an instrument in writing for the payment of money which will be presumed to be a several contract. In such case, if judgment be entered against one shown by the record not to have been served, or against one appearing from the record to be a married woman, and also against other parties who are *sui juris*, the judgment will be held to be void as to the married woman, or person not served, and voidable only as to the others, and, there-

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fore, as to them not open to collateral attack. This is evidently the ground upon which this court proceeded in *Lenox v. Clarke*, 52 Mo. 115, where a judgment against two which was void as to one, was held valid as to the other, when collaterally assailed. The same principle is recognized in *Wernecke v. Wood*, 58 Mo. 352, where it is stated *arguendo*, that a judgment void, as to one of several defendants, may be enforced against the others. And in *Fithian v. Monks*, 43 Mo. 502, the judgment was held to be void only as to Mrs. Fithian, one of the defendants therein. The general statement made in *Hoskinson v. Adkins*, 77 Mo. 537, that a judgment, void as to one is void as to all, is subject to the qualifications here made. The judgment and sheriff's deed should, therefore, have been admitted in evidence against those of the plaintiffs named therein, who were not married women, and who had an estate in the land sold.

The appointment of a next friend for Thos. J. Holton was irregular and illegal. Such appointments can only be made at the time and in the manner pointed out by the statute. But treating this appointment as a nullity, the judgment could not be reversed on that ground, as the statute expressly provides that no judgment shall be reversed because an infant appeared by attorney when the judgment is in favor of the infant. R. S. § 3582.

The disposition we have made of the case renders it unnecessary for us to pass upon the objections made to some of the oral testimony introduced by the plaintiffs.

For reasons heretofore given, the judgment will be reversed and the cause remanded. The other judges concur except Judge SHERWOOD, who is absent.

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WERNER V. THE CITIZENS' RAILWAY COMPANY, *Appellant.*

1. **Negligence: VARIANCE.** Where the negligence proved is sufficient to support an action, and is of the same character as that alleged, although not proved to the extent alleged, there is no variance.
2. **Contributory Negligence, when no Defense.** When the negligence of the defendant, which contributes directly to cause the injury, occurs after the danger, in which the injured party has placed himself by his own negligence, is, or by the exercise of reasonable care, may be discovered by the defendant in time to avert the injury, the defendant is liable, however gross the negligence of the injured party may have been in placing himself in a position of danger.

*Appeal from St. Louis Court of Appeals.*

**AFFIRMED.**

*Brown & Young* for appellant.

No negligence on the part of the defendant was proven; certainly not the kind of negligence declared on in the petition, and hence the instruction for nonsuit should have been given. *Buffington v. Railroad Co.*, 64 Mo. 216; *Waldhiser v. Railroad Co.*, 71 Mo. 516; *Price v. Railroad Co.*, 72 Mo. 420. There was negligence on the part of deceased contributing directly to the accident, which precludes recovery by plaintiff. *Karle v. Railroad Co.*, 55 Mo. 484; *Isabel v. Railroad Co.*, 60 Mo. 482; *Whalen v. Railroad Co.*, 60 Mo. 327; *Mayer v. Railroad Co.*, 64 Mo. 276; *Zimmerman v. Railroad Co.*, 71 Mo. 484; *Yarnale v. Railroad Co.*, 75 Mo. 575, 586; *Lenix v. Railroad Co.*, 76 Mo. 91; *Button v. Railroad Co.*, 18 N. Y. 248; *O'Keefe v. Chicago*, 32 Ia. 467; *Cooley on Torts*, 674; *Thompson on Negligence, passim* and specially, vol. 2, pp. 1156, 1157, and following, with authorities there cited. The instructions given by the court, of its own motion, were wrong in matter of law, inconsistent with each other, and calculated to mislead the jury. Defendant's instructions should have been given.

*Hugo Muench* with *Henry Hitchcock* for respondent.

This action, as clearly indicated by the petition, is based upon the doctrine now firmly imbedded in the jurisprudence of our State: That, in cases of collision and personal injury, even though the injured party has been guilty of negligence, and notwithstanding such negligence may have served to bring about the conditions under which he was injured; yet, if it nevertheless appears that the proximate cause of the injury was either the omission of the defendant, after becoming aware of the danger to which the injured party was exposed, to use a proper degree of care to avoid such injury, or a failure to discover that danger through recklessness or carelessness, when the exercise of ordinary care would have discovered it and averted the calamity, the defendant will be held liable. *Harlan v. Railroad Co.*, 65 Mo. 26; *Isabell v. Railroad Co.*, 60 Mo. 475; *Maher v. Railroad Co.*, 64 Mo. 276; *Hicks v. Railroad Co.*, 64 Mo. 437; 65 Mo. 36; *Zimmerman v. Railroad Co.*, 71 Mo. 484; *Swigert v. Railroad Co.*, 75 Mo. 480; *Yarnall v. Railroad Co.*, 75 Mo. 586; *Frick v. Railroad Co.*, 75 Mo. 610; *Kelly v. Railroad Co.*, 75 Mo. 140. There was no variance between the negligence averred and that proved. *Conway v. Reed*, 66 Mo. 346.

HENRY, J.—Plaintiff sued for damages, under the statute, for the alleged negligent killing of her husband, Louis Werner, by one of defendant's street cars. The defenses pleaded were a denial of the facts alleged and contributory negligence on the part of the deceased. There was evidence tending to prove that deceased was guilty of contributory negligence; that in a state of intoxication he lay, or fell down, on the defendant's track and remained there until run over by the car, which occurred about 8:25 o'clock at night. It was a dark night and the only passengers on the car were Clifton and his wife, who testified that it was difficult to see any object at a distance, and that one would

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be liable to mistake as to what an object on the track was. That immediately after the accident the car was stopped and Werner was lying by the foot of the rear platform. The driver testified that he saw an object lying ahead of the horses, about fifteen feet, and supposed it was a bundle of hay or a sack of oats. That he could have stopped the car in two feet, but made no effort to stop it or ascertain what the object was, until after the car passed over it. That after he discovered the object on the track he proceeded right along, looking straight over his horses' heads. The court at the close of the evidence of its own motion gave the following instructions:

1. The court instructs the jury that the burden of proof upon plaintiff is to establish that Louis W. Werner came to his death in consequence of the negligence of the defendant, its servants or agents, having the management of its car at the time of the disaster.

2. If you believe from the evidence that the driver of defendant's car, by the exercise of ordinary care and prudence, might have ascertained that the object he saw lying in the track was a human being before he ran over it, and might then have stopped the car and avoided running over the deceased, then you will find for the plaintiff in the sum of \$5,000.

3. In case you believe that the driver of the car which did the injury, by the exercise of ordinary care and prudence might have ascertained that the object he saw lying in the track was a human being before he ran over it, and might then have stopped the car before injuring the deceased, and that the driver failed to exercise such ordinary care and prudence, then the plaintiff will be entitled to a verdict, even though you may further believe that the deceased became drunk, and laid down on the track intentionally or in a state of intoxication.

4. On the other hand, if you believe and find that the driver of the defendant's car, after he discovered an object lying on the track, exercised such care and prudence as an



ordinarily prudent and careful driver would have exercised, under the same or similar circumstances, and was not able, in the exercise of such care, to discover that the object he saw was a human being before he ran over it, but in fact believed the object to be something else, then your verdict should be for the defendant.

5. If you believe that the deceased became drunk and laid down on the track in a state of intoxication, then he took the risk of being run over, and the plaintiff cannot recover, unless he proves that the driver of the car, after he saw the deceased lying on the track, failed to exercise ordinary care and prudence in discovering or ascertaining what the object was before running over it.

And refused the following instructions asked by the defendant:

1. If the jury believe from the evidence that the deceased, Louis W. Werner, while intoxicated or under the influence of drink in the night time, lay or fell down, and remained upon defendant's track in the public street in the city of St. Louis, when defendant's cars and other vehicles were passing from time to time, then such act constituted negligence on his part; and if the jury believe from the evidence that such negligence contributed directly to the injury complained of, then they will find a verdict for defendant.

2. That although the jury may believe from the evidence that the driver of defendant's car, which ran over and injured deceased, Werner, saw an object in front of his horses just before such accident, yet that fact will not authorize the jury to find for plaintiff, unless the jury further believe that said driver failed to exercise ordinary care and skill in the management of said car after seeing said object; and in arriving at a conclusion as to whether he did so exercise ordinary care and skill in the management of said car, the jury should take into consideration the appearance of the object, the darkness of the night, and all the facts

and circumstances connected with the accident as shown by the evidence.

3. The court instructs the jury, that if they believe from the evidence, that the deceased, Louis W. Werner, was guilty of negligence and misconduct, which contributed directly to the accident which resulted in his death, they will find for the defendant.

The jury found a verdict in favor of plaintiff for \$5,000. A motion for a new trial, based upon the usual grounds, was overruled by the court, the case appealed to the court of appeals, there affirmed, and thence taken by defendant to this court.

The first point made by appellant's counsel is, that there was a variance between the negligence averred in the petition and that proved. The negligence alleged was that "the death of plaintiff's husband was occasioned by the negligence of defendant, through its servants in this, that, although knowing that he was on the track and unable to remove himself therefrom, they recklessly, etc., failed to check or stop said car, but with great force, etc., ran the same over him." Whereas the proof was that the driver, the only one of defendant's servants then on the car, did not know it was Werner, but supposed the object to be a bundle of hay or a sack of oats. Counsel make an ingenious and plausible argument in support of this proposition, but the substance of the averment in the petition is, that deceased was run over through the negligence and carelessness of the driver, and while he testified that he did not know that the object he saw on the track was Werner, by the exercise of reasonable care he could have ascertained that fact, or at least that it was a human being, before he ran the car over him. The argument would be just as forcible if the driver had testified that he knew the object he saw on the track was a human being, but he did not know it was the individual Werner. It is not a case of variance, but an instance in which negligence of the character alleged is proven, but not to the extent alleged, but suf-

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ficient to support the action, and in its facts and the principle involved, is wholly unlike the cases of *Waldhier v. Railroad Co.* 71 Mo. 514; *Price v. Railroad Co.* 72 Mo. 414, and *Buffington v. Railroad*, 64 Mo. 246.

In this connection the appellant's counsel contends that no negligence on the part of defendant was established, and argues thus: "If the driver in the dust and darkness had seen nothing at all on the track, but driven on and over deceased, it is clear that no negligence could have been imputed to him. It would have been an injury resulting solely from plaintiff placing himself across the track of the railway in front of a moving car. But if a total obscuration of his sight would have relieved him from the charge of negligence, can a partial obscuration to the extent it went and the effect it produced, have a contrary effect?"

If the darkness of the night had prevented the driver from seeing the object on the track, it may be conceded that no negligence would be imputed to him; but the fallacy of the argument lies in the deduction from the fact that a total obscuration of his sight would release him from the charge of negligence, that a partial obscuration to the extent it went and the effect it produced, would relieve him of the charge. This is a *non sequitur*. There would have been nothing to call into activity more care and prudence on the part of the driver, than was necessary to guide the horses when no danger was apparent, or reasonably apprehended, but when he could see an object on the track as large as a sack of oats, he had reason to apprehend danger, not only to his passengers and the property in his care, but to strangers or their property, and to hold that he might drive on with the same indifference as if he had seen nothing on the track, because he could not discern what it was, would be to sanction recklessness, and ignore the duty of carriers to avoid injuring persons and property when aware of the danger to which they are exposed, or when they have reasonable grounds for an apprehension that by proceeding as usual with their vehicles, injury will be in-

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dicted upon persons or property. Counsel indulges in a criticism of the cases in which this court has held that if the negligence of a defendant which contributed directly to cause the injury, occurred after the danger in which the injured party had placed himself by his own negligence, was, or by the exercise of reasonable care, might have been discovered by the defendant, in time to have averted the injury, then defendant is liable, however gross the negligence of the injured party may have been in placing himself in such position of danger. Such is the well established doctrine of this court. *Isabel v. Railroad Co.*, 60 Mo. 475; *Harlan v. Railroad Co.*, 65 Mo. 26; *Zimmerman v. Railroad Co.*, 71 Mo. 484; *Frick v. Railroad Co.*, 75 Mo. 61; *Kelly v. Railroad Co.*, 75 Mo. 140.

And the case at bar is an apt illustration of the wisdom of the rule. In a populous city, on one of its public thoroughfares which pedestrians are crossing at all hours of the day and night, the driver of a street car on a dark night, discovers an object fifteen feet ahead of his horses, which he supposes to be a bundle of hay or a sack of oats, with but little reason to suppose, and which he could have ascertained to be a human being, if he had checked his horses and driven slowly up to the object, instead of recklessly driving ahead looking, not at the object, but over his horses' heads, not endeavoring to determine what the object was, but indifferent to its character, not stopping the car or checking its speed until he had run over and killed a human being, when the exercise of ordinary care and prudence involving a delay of only ten or fifteen seconds, would have disclosed that it was a human being, and saved a human life. It is contended by the defendant's counsel that the discovery of the danger in which Werner had placed himself, and the infliction of the injury, were simultaneous and that, therefore, this doctrine has no application. The facts of the case, as testified to by defendant's witness, do not sustain that theory. The driver testified that he saw the object fifteen feet ahead of the horses. That he could have stopped

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the car in two feet; so that he had ample time, after seeing the object on the track, to stop the car before the horses reached it. The instructions given by the court fairly declared the law applicable to the facts, and there was no occasion for giving those asked by defendant.

The judgment of the court of appeals is affirmed. All concurring, except SHERWOOD, J., absent.

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WEEKS V. ETTER, *Appellant*.

1. **Justices of the Peace, Authority of:** NONSUIT, MOTION TO SET ASIDE. A justice of the peace has only such authority as the statute gives him. He has no general power to set aside verdicts, and can only set aside nonsuits when entered on account of the absence of the plaintiff. Where the plaintiff is present when the nonsuit is entered, he has the right to appeal without filing a motion to set it aside.
2. **Title:** POSSESSION. Actual possession is evidence of title against any one who does not show a better title

*Appeal from Moniteau Circuit Court.*—HON. E. L. EDWARDS,  
Judge.

**AFFIRMED.**

*Rice & Walker and Silver* for appellant.

The judgment of the justice being one of nonsuit, there should have been a motion filed to set the same aside, and without such motion the appeal was a nullity. R. S., 3041. The instruction given for plaintiff is not a proper one in a replevin suit, where the only question at issue is the right to the possession of the chattel. 2 Wharton Ev., § 1331; *Gartside v. Nixon*, 43 Mo. 139. The instruction is further erroneous in declaring the possession of the hog in October, 1879, to be presumptive evidence of title. The



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suit was instituted November 3rd, 1879, and the time should have applied to the institution of the replevin action, if an instruction of the kind should be given at all. Plaintiff, to recover, must show that he is entitled to the immediate possession. *Cross v. Hulett*, 53 Mo. 397.

*Moore & Williams* and *Draffen & Williams* for respondent.

The judgment in this case was not a nonsuit, within the meaning of Revised Statutes, section 3041, and the justice, therefore, had no power to set it aside, and plaintiff was not bound, as a preliminary to the right of appeal, to move the justice to set it aside. *Hannibal, etc., Plank Road Co. v. Robinson*, 27 Mo. 396. The instruction given for plaintiff was correct. The appellant did not preserve the evidence upon which it was based, and this court cannot decide whether or not it was properly given. *Crews v. Blodgett*, 64 Mo. 453. Before the court can hold it was improper, it must decide it enunciated a principle, that under no state of facts was the law. The converse has frequently been decided by this court. *Van Zant v. Hunter*, 1 Mo. side p. 72. An actual possession is evidence of title against every one who does not show a better title. In the absence of other evidence, a prior lawful possession is proof of a better title. *Simmons v. Austin*, 27 Mo. 307.

EWING, C.—This was a statutory proceeding before a justice of the peace for the claim and delivery of personal property, to-wit, "a black berkshire barrow hog, of the value of \$6." The defendant moved to dismiss, because the hog was in custody of the law and not subject to replevy. This motion was sustained. The plaintiff then appealed to the circuit court of Miller county, where the defendant moved to dismiss for want of jurisdiction, upon the ground that the judgment of the justice was a nonsuit, and the plaintiff did not move to set it aside, as required by statute, within ten days, nor at any time, before appeal.

This motion the court overruled; whereupon the defendant prayed for a change of venue which was awarded, and the case sent to Moniteau county. Without any further preliminary matters the case was tried in the Moniteau circuit court, where there was a verdict and judgment for the plaintiff for \$6 with 1 cent damages, from which the defendant appealed to this court.

I. The first and second points made by the appellant, that there was no affidavit and bond for appeal from the justice, nor a statement of the cause of action, have no longer any force, since the amended record filed in obedience to the writ of *certiorari* discloses the fact that the statement was filed, as also the affidavit and appeal bond.

II. The third point made by the appellant is, that "the judgment of the justice being one of nonsuit, there should have been a motion filed to set it aside, and without such motion, the appeal was a nullity." That part of section 3041, upon which appellant relies, is as follows: "No appeal shall be allowed in any case unless the following requisites be complied with: First, the appeal must be made within ten days after the judgment rendered, or, when judgment is by default or nonsuit, within ten days after the refusal of the justice to set aside the default or nonsuit and grant a new trial." Section 2948 provides: "In all cases, not otherwise especially provided for, if the plaintiff fail to appear, in person or by agent, within three hours after the time appointed for the trial of the cause, the justice shall render judgment of nonsuit against him with costs." The third subdivision of section 2947 provides: "Third, if the plaintiff fail to appear, except where the suit is founded on an instrument of writing, as is declared in the first clause of this section, the justice shall render judgment of nonsuit against the plaintiff, with costs." Section 2949 provides: "Every justice shall have power \*  
\* to set aside the judgment of nonsuit and by default,"  
etc. \* \* every such application shall be made

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within ten days \* \* after the rendering of the judgment."

So that the statute only provides for nonsuit against plaintiff, *if he fails to appear*. In this case he did appear. When, therefore, nonsuit is entered against him for non-appearance, he may appeal, provided he files his motion to set it aside within ten days after judgment rendered. But being present when rendered, it requires no motion to set aside. He may appeal at once without such motion. This identical question was passed upon by this court in *Hannibal, Ralls Co. & Paris Plank Road Co. v. Robinson*, 27 Mo. 396. That decision was under the Revised Code of 1845, which, also, provides that: "Every such application" (that is to set aside a judgment of nonsuit) "shall be made within ten days after rendering judgment." It was there held that the judgment of nonsuit referred to cases where the plaintiff was not present.

A justice of the peace has no power, except what the statute gives him; and the statute only provides for setting aside nonsuits in cases where the nonsuit was entered, because of the absence of the plaintiff. He has no general power to set aside verdicts. Hence, the plaintiff being present when the nonsuit was entered, he had the right to appeal without filing a motion to set it aside.

III. The next point made by the appellant is, as to the instructions given for the plaintiff. The first instruction given for plaintiff, and the only one complained of, reads as follows: "If the jury believe from the evidence in this case that in the month of October, 1879, Weeks, the plaintiff, had in his possession and under his control the hog in question, using and claiming him as his own, then such possession on the part of Weeks is *prima facie*, or presumptive evidence that he was the rightful owner of said hog. And if the jury should further find from the evidence that at the time of the commencement of this suit Weeks, the plaintiff, was the owner of the hog sued for, then they must find their verdict for the plaintiff."

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This instruction is not objectionable. "Actual possession is evidence of title against any one who does not show a better title." 2 Greenleaf Ev., § 637; *Simmons v. Austin*, 36 Mo. 307; *Smith v. Lydick*, 42 Mo. 209.

The judgment of the circuit court must be affirmed. PHILIPS, C., not sitting; MARTIN, C., concurs.

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PATTERSON V. YANCY, *Appellant*.

1. **Justice of the Peace, Jurisdiction of.** A justice of the peace has no jurisdiction to try a suit brought by the grantee under a warranty deed against the grantor to recover taxes paid by the former, and which the latter, by the terms of his warranty, was required to pay.
2. **Covenant against Incumbrances: FOUNDATION OF SUIT: RECOVERY OF TAXES.** The foundation of an action for the recovery of taxes paid by the grantee under a deed containing covenants against incumbrances, is proof of such a deed, and the existence of the taxes as an incumbrance, and their payment by the grantee. Without proof of these, such suit cannot be maintained.

*Appeal from Howard Circuit Court.*—HON. G. H. BURKHARTT, Judge.

REVERSED.

*R. B. Caples* for appellant.

The justice had no jurisdiction of the subject matter of this action. It required for its determination, the question of what title Yancy conveyed to Patterson in selling him the land on which the taxes were paid. Yancy's only liability was upon the covenants in his deed. It is not an action of debt, and the only remedy is an action on Yancy's covenants. The motion to dismiss for this reason should have been sustained by the circuit court.

There was no evidence in the circuit court to show

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any liability in defendant to pay the taxes. His liability is based upon the covenants in the deed, and there was no evidence that the deed contained covenants against encumbrances. The assertion of Patterson, that Yancy gave him a warranty deed, is no evidence—the deed itself is the only evidence to determine this question. The court knowing it could not examine the title deeds to the land, allowed plaintiff to give oral testimony of the covenants of the deed, against the objection of plaintiff. The case, for these reasons, should have been dismissed. *Bredwell v. Loan & Investment Co.*, 76 Mo. 321; R. S., § 2837.

No brief for respondent.

PHILIPS, C. This action was begun in a justice's court, based on the following statement :

"1879, August 12th. Robert Yancy in account with J. H. Patterson. To amount of taxes paid collector of Howard county on land purchased of him, for which he gave warranty deed, \$82.49."

Plaintiff having recovered judgment thereon, the defendant appealed to the circuit court, where the plaintiff again prevailed. The defendant has brought the case here on appeal.

Both in the justice's court and circuit court, the defendant moved to dismiss the case, for the reason that the justice had no jurisdiction over the subject matter of the action. These motions should have been sustained. It is manifest on the face of the statement that the suit is that of a grantee, under a warranty deed, against his grantor, to recover taxes which the grantee has paid, and which the grantor was required to do by his warranty. The statement means this or nothing. It states no other cause of action. The justice had no jurisdiction to try such an action. *Bredwell v. The L. & I. Co.*, 76 Mo. 321.

Nor did plaintiff's evidence show any cause of action. He testified that he bought a tract of land from defendant,



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that defendant told him the taxes were paid ; that afterward he learned from the collector that a suit had been brought against the land for taxes, and, to save costs, he paid the taxes to the collector. He stated that the defendant never said the taxes were due, nor did he ever authorize the plaintiff to pay them. He stated on cross-examination that he received a warranty deed from defendant for the land, but, on objection of plaintiff, the court excluded this evidence. Manifestly, no cause of action was proved, without the admission of the deed containing a covenant against incumbrances. Neither was there any competent proof that a dollar of taxes had been legitimately assessed against the land. So far as the evidence disclosed, the payment of the tax by plaintiff was voluntary. The foundation of his cause of action was the existence of a deed, with covenants against incumbrances, and proof of the existence of a valid incumbrance, and the payment thereof by the grantee. There was no proof of these; and if there had been, it would have disclosed the want of jurisdiction of the justice of the peace. The demurrer interposed by defendant to the evidence should have been sustained.

The judgment of the circuit court is, therefore, reversed, and the action dismissed. All concur.

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THE STATE *ex rel.* HALL, *Collector*, v. COWGILL *et al.*, *Appellants*.

**Taxes:** PETITION: DESCRIPTION. Where land, against which the lien for taxes is sought to be enforced, is specifically described in the petition and tax bill, and the tax bill and other evidence identify it, so there can be no mistake, the judgment of the court finding the tax to be due on such land, will be affirmed.

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*Appeal from Jasper Circuit Court.*—HON. JOSEPH CRAVENS,  
Judge.

**AFFIRMED**

*Harding & Buler* for appellants.

The tax bill was clearly void for uncertainty in the description. *City of Jefferson v. Whipple*, 71 Mo. 519. And the trustee's deed upon which the court seems to have predicated its finding, could only tend to worse confusion. The deed calls for twenty-five acres, while the petition calls for twenty-seven. For aught that appears, Butler and Gilbert may still own the land on which these taxes were assessed, and the circuit court is not county assessor.

*A. G. Williams* for respondent

EWING, C.—This was a proceeding under the statute to recover back taxes on certain real estate in Jasper county, in which the plaintiff claims, and by this suit seeks to enforce a lien against "twenty-seven acres, part southwest quarter, northeast quarter, part southeast quarter, northeast quarter section 21, township 29, range 32, for 1877, and twenty-seven acres, part southwest quarter, northeast quarter, part southeast quarter, northeast quarter, section 21, township 29, range 32, 1878. The above land of twenty-seven acres being more particularly known as the Cowgill and West mill property, being the same land conveyed to defendants by Eugene O'Keefe, by trustee's deed dated January 21st, 1878, and recorded in deed-book 45, pages 477, 478, 479, in recorder's office of Jasper county, Missouri."

To sustain the issues on its part, the plaintiff offered in evidence a tax bill, signed by W. E. Hall, collector of the revenue, within and for Jasper county, and State of Missouri, and which reads as follows :

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STATE OF MISSOURI, }  
County of Jasper. } ss.

I, W. E. Hall, collector of the revenue, in and for the county of Jasper, in the State of Missouri, do hereby certify that the following amounts of back taxes remain delinquent in favor of the several funds for the several years, and upon the real estate lying, and being situate in said county and State, set opposite thereto, to-wit: Name of owner, Albert G. Cowgill, Isaiah M. West; acres 27, part southwest quarter, southeast quarter, section 21, township 29, range 32; part southeast quarter, northeast quarter, section 21, township 29, range 32, 1877 and part" (here repeating this description for the year 1878 and extending the several sums for the different taxes). "In witness whereof I have hereunto set my hand at the town of Carthage, in said county and State, this 20th day of January, 1880.

W. E. HALL,

Collector revenue in and for Jasper county, Mo."

To the introduction of which defendant objected for vague and indefinite description, and for showing on its face there was no valid assessment. Plaintiff then offered in evidence the deed from O'Keefe, mentioned specifically in the petition, in which the land above described, appears fully described by minute metes and bounds with courses and distances set out, containing "twenty-five acres more or less." This deed was objected to as irrelevant, and not tending to prove any of the issues in the case. It was admitted that the land was assessed to Butler and Gilbert for the years sued for under the description as contained in the tax bill. This was all the evidence in the case. The court found for the plaintiff.

The case does not come within the scope of the *City of Jefferson v. Whipple*, 71 Mo. 520. In that case the only description in the petition was "part of in lot No. 331 on the plat of said city." There was no other allegation as to description setting out the specific part of the lot by metes and bounds, courses, distances and quantity. There was no

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other evidence offered than the tax bill itself; nor indeed could there have been in that case, because the allegations in the petition would not permit it. But here a specific description is set out in the petition. The part of the land on which the lien is sought to be enforced was fully described and bounded, so that there could be no mistake. The judgment of the court finds the tax to be due on the specific part set out in the petition and tax bill, and described in the decree, and finds the defendants to be the owners of the land taxed. Let the judgment be affirmed. All concur.

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THE STATE V. HENSON, *Appellant*.

1. **Pleading, Criminal:** INDICTMENT. An indictment for murder which avers that the striking and wounding were in the heart, and that the mortal wound, so given, was through the body, is not repugnant, and the wound need not be described.
2. **Practice, Criminal:** ABSENT WITNESS: CONTINUANCE. Where the affidavit for a continuance, by the defendant in a criminal case, shows on its face that subpoenas had been issued and returned not served on the witnesses whose absence constituted the basis of the application, and the prosecuting attorney having agreed that the facts set out in the affidavit should be read as the testimony of such witnesses, it was not error to deny the continuance.  
The continuance might well have been refused upon the further ground that the affidavit failed to state where the absent witnesses resided, or might be found, as required by statute. R. S. 1879, § 1884.
3. **Change of Venue:** DISCRETION OF TRIAL COURT. In the absence of evidence in the record showing, or tending to show, that the trial court abused its discretion in denying an application for a change of venue, the Supreme Court will not disturb its ruling.

*Appeal from Howell Circuit Court.*—HON. J. R. WOODSIDE,  
Judge,

**AFFIRMED.**

No brief for appellant.

*D. H. McIntyre*, Attorney General, for the State.

There was no repugnancy in the charge that the striking and wounding were in the breast, and the mortal wound so given was in and through the body. The breast is a part of the body. The indictment need not state upon what part of the body the wound was given, nor describe the wound. *State v. Edmundson*, 64 Mo. 398; *State v. Sanders*, 76 Mo. 35. It is only necessary to allege an assault, its nature, a mortal wounding and death from such wounds within a year and a day from their infliction. *State v. Blan*, 69 Mo. 317; *People v. King*, 27 Cal. 507; *Jones v. State*, 35 Ind. 122. It was not error in the court to overrule defendant's application for a continuance. Defendant did not show in his affidavit where the absent witnesses resided, or might be found, as required by the statute. R. S. 1879, § 1884. The affidavit, itself, reveals the fact that subpoenas had been issued and could not be served, because the witnesses could not be found. It is in cases of this kind that the admissions may be made by the State, as provided by section 1886, and a continuance prevented. *State v. Hickman*, 75 Mo. 419.

The record contains nothing to show that the court abused its discretion in overruling defendant's application for a change of venue. It was a matter resting in the discretion of the trial court. R. S. 1879, § 1859; *State v. Whitton*, 68 Mo. 91; *State v. Guy*, 69 Mo. 431; *State v. Bohanan*, 76 Mo. 562. It makes no difference that defendant did not intend to shoot the deceased. The killing was done in the attempt to perpetrate another felony, and although defendant bore deceased no malice, the law transfers the malice and makes it murder. 1 Hale P. C., top p. 466; Foster's Crown Law, 258, 259, 261; 1 East P. C., 230, 257; 1 Bish. Crim. Law, (5 Ed.) § 328, and authorities cited; 1 Hawkins P. C., p. 126, § 41; *State v. Smith*, 32 Me. 369.



NORTON, J.—At the October term, 1882, of the Howell county circuit court, defendant was indicted for murder in the first degree for killing one Frank Vosburg on the 21st of August, 1882. He was tried at the same term and found guilty of murder in the second degree, and his punishment assessed at twenty-five years imprisonment in the penitentiary. From this judgment defendant has appealed, and by his appeal puts in question the propriety of the action of the trial court in overruling a demurrer to the indictment, in refusing to grant a continuance of the cause, in overruling defendant's application for a change of venue and in giving and refusing instructions.

The indictment was demurred to on the ground that it was vague and uncertain in that it alleged the wound to have been given in the heart, and that the wound causing death was through the body, and that the wound was not described. The indictment alleges an assault, a wounding and the instant death of the deceased as the result of such wounding, and that such wounding was done wilfully, feloniously, deliberately, premeditatedly and with malice aforethought. There is no repugnacy in the averments that the striking and wounding were in the heart, and that the mortal wound so given was through the body. The objections to the indictment on this ground, as well as on the ground that the wound was not described as to length, depth, etc., is answered by the case of *State v. Edmundson*, 64 Mo. 398; *State v. Sanders*, 76 Mo. 35 and *State v. Blan*, 69 Mo. 317. The demurrer was properly overruled.

The affidavit for continuance showed upon its face that subpoenas had been issued and returned, not served on the witnesses whose absence constituted the basis of the application, and the prosecuting attorney having agreed that the statement of what defendant expected to prove by the absent witnesses should be read as their evidence, it was, therefore, under the authority of the case of *State v. Hickman*, 75 Mo.

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419, properly overruled. Besides this, the affidavit failed to state where the absent witness resided, or might be found as required by section 1884, Revised Statutes, and might well have been refused on that ground.

In the absence of any evidence in the record showing, or tending to show, that the inhabitants of Howell county were so prejudiced against defendant that he could not have a fair trial therein, we cannot say that the trial court abused its discretion in overruling the application for a change of venue, based upon the ground that the inhabitants of said county were so prejudiced against defendant that he could not have a fair trial in said county. *State v. Whitton*, 68 Mo. 91; § 1859, R. S.; *State v. Bohanan*, 76 Mo. 562

The evidence adduced on the trial tended to show that the accused made an unprovoked and deadly assault upon one Wench with a pistol, and that deceased interfered to prevent the execution of his design, and was shot and instantly killed by defendant. Upon this state of facts the jury were instructed by the court as to murder in the first and second degrees by instructions properly defining those offenses, and setting forth the *quantum* of evidence necessary to authorize a conviction for either of said offenses, and are unexceptionable.

We discover no error in the record justifying an interference with the judgment, and it is hereby affirmed. All concur except Judge SHERWOOD, absent.

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THE STATE V. PULLENS, *Appellant*.

1. **Criminal Law:** *IDEM SONANS*. The name "Lossene" is *idem sonans* with "Lawson."
2. ———: **INDICTMENT: PURPORT: TENOR**. It is not required, either at common law, or by statute, that both the purport and tenor of an instrument charged to have been forged, should be set out in the indictment. It is sufficient to describe it by its purport, (R. S. 1879, § 1814,) or the instrument may be set out according to its tenor only.

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3. **Indictment: PURPORT: TENOR.** The tenor of an instrument means an exact copy of it, while the word "purport" imports what appears on the face of an instrument, and means the apparent, not the legal import.
4. ———: ———: ———. Although the statement of the purport of an instrument be repugnant, yet, if the instrument is set out according to its tenor, the indictment will be sufficient under the statute. R. S. 1879, § 1821.
5. ———: **FORGERY: BANKING INSTITUTION.** An indictment which charges the forgery of a promissory note "payable to the order of the People's Savings Bank" at "the banking house of the People's Savings Bank," sufficiently charges that the latter was a banking institution.
6. **Practice, Criminal: INSTRUCTION.** An instruction need not be as technical as an indictment, and it is sufficient to charge that, if defendant falsely made and forged the note in question, with intent to injure and defraud, the jury should convict. It need not declare that the jury, in order to convict, must find that defendant falsely, fraudulently and feloniously made and forged the instrument.

*Appeal from Livingston Circuit Court.*—HON. J. M. DAVIS,  
Judge.

**AFFIRMED.**

*Broaddus & Wait* for appellant.

1. It cannot be contended that a promissory note can purport to be signed by J. J. Lawson by any name except J. J. Lawson. 1 Whar. Crim. Law, (Ed. 1874) § 342 a; Bouvier's Law Dic., Title "Purport." 2. Private corporations must be pleaded. 2 Whar. Crim. Law, (Ed. 1874) §§ 1458, 1488. Revised Statutes, section 1915, 1821, do not aid the State. Where no one could be defrauded, there can be no intent to defraud. 3 Greenlf. Ev., § 103; *People v. Fitch*, 1 Wend. 198; *Colvin v. State*, 11 Ind. 361. The demurrer should, therefore, have been sustained. 1 Whar. Crim. Law, (Ed. 1874) § 396. The court erred in instructing the jury that if defendant falsely made and forged the instrument in question with intent to injure and defraud, they should find him guilty. It should have declared that, in order to

convict, they must find that he falsely, fraudulently and feloniously made and forged the note with intent to injure and defraud. Defendant could not intend to defraud J. J. Lawson by signing the name of Jackson Lossene. He could not have forged the name of Jackson Lossene, as that is the name of a fictitious person, and no such charge is contained in the indictment.

*D. H. McIntyre*, Attorney General, for the State.

Where a fictitious signature is stated, it should be described as purporting to be the signature of the real party. Roscoe's Crim. Ev., (7 Ed.) p. 564. Defendant signed the name of *Jackson Lossene*, intending that the bank should accept the note, believing it to be indorsed by James Jackson Lawson, the name of the real person, and it was proper to describe it as purporting to be signed by J. J. Lawson under the name of Jackson Lossene. *State v. Bibb*, 68 Mo. 286; *Reg. v. Mahony*, 6 Cox C. C. 487. It is sufficient to charge a general intent to cheat and defraud, without averring an intent to cheat and defraud any particular person. R. S. 1879, § 1686; *State v. Scott*, 48 Mo. 422; *State v. Phillips*, 78 Mo. 49. It was not necessary to aver that the People's Savings Bank was a corporation. It is sufficient to describe it by its general name used in business. *Reg. v. Atkinson*, 2 Moody top. p. 353; *Comm. v. Dedham*, 16 Mass. 139. When a name, such as is used in creating corporations, is referred to in an indictment, and which name discloses no individuals, corporate existence is implied without averring it. *Johnson v. State*, 65 Ind. 204; *Fisher v. State*, 40 N. J. L. 169. And it was competent to prove by parol that the People's Savings Bank was a corporation. R. S. 1879, § 1915. The instruction need not have told the jury that, in order to convict, they should find that defendant falsely, fraudulently and feloniously made and forged the note. It was sufficient to declare that if he falsely made the note with intent to cheat and defraud, the jury should convict.

HOUGH, C. J.—The defendant, in this case was convicted of the crime of forgery. The material portions of the indictment are as follows: “That one Turner Pullens

\* \* unlawfully and feloniously did falsely make, sign and counterfeit a certain instrument in writing, commonly called a promissory note, payable to the order of the People’s Savings Bank, and purporting to be signed by the said Turner Pullens, and also by one J. J. Lawson, by the signature of Jackson Lossene, and dated at Chillicothe, Mo., on the — day of January, 1883, whereby a pecuniary demand and obligation for the payment of \$85 at the banking house of the People’s Savings Bank at Chillicothe, purported to be created in favor of the said People’s Savings Bank, and against the said Turner Pullens and J. J. Lawson, and purported to be due four months after the date thereof, with interest thereon at the rate of ten per cent per annum from maturity, and which said false, forged and counterfeited instrument in writing, commonly called a promissory note, is in words and figures as follows, that is to say:

“CHILLICOTHE, Mo., January —, 1883.

“Four months after date we promise to pay to the order of the People’s Savings Bank eighty-five dollars for value received, payable at the banking house of the People’s Savings Bank at Chillicothe, with ten per cent interest per annum from maturity.

Due \$85.

TURNER PULLENS.

JACKSON LOSSENE.

“With intent then and thereby, unlawfully and feloniously, to injure and defraud, against the peace and dignity of the State.”

It appears from the testimony, that the defendant applied to the People’s Savings Bank to borrow some money. The officers of the bank told him that he could have the money, if he would get some good man to go on his note. Defendant said he could get Jack Lawson. They said



he could get the money, and filled up the note for him, set out in the indictment. When the defendant brought the note back, signed as it appeared at the trial, for the purpose of getting the money, and was asked by the cashier of the bank if Lawson had signed it, he said "no," that Joseph Lawson signed it, as Jackson Lawson had a sore hand. The cashier inquired of some one whether Jackson Lawson had a son named Joseph, and learning that he had not, kept the note, and sent word to Mr. Lawson to have the defendant arrested. J. J. Lawson testified that his name was James Jackson Lawson, that he did not sign the note, or authorize any one to sign it for him, and that the defendant came to him while under arrest and confessed that he did the act, and asked him to release him, that he thought he could get the money and pay it off before he, Lawson, found it out. The defendant also admitted to the officer who had him in custody, that he signed Lawson's name to the note. Whether the name of Lawson was written on the note, "Lossene" by reason of illiteracy, or otherwise, does not appear. The name signed is *idem sonans* with "Lawson."

Three reasons are urged by the defendant's counsel why the judgment of conviction should be reversed: First, because the indictment is repugnant and insufficient, as a note signed *Jackson Lossene*, cannot purport to be signed by *J. J. Lawson*. Second, because the People's Savings Bank is not alleged in the indictment to be a corporation; and third, because the court erred in its instruction to the jury.

It has never been required, either at common law, or by any statute of this State, that the purport and tenor of an instrument, charged to have been forged, should both be set out in the indictment. Section 1814 of the Revised Statutes provides, that, it shall be sufficient to describe the instrument forged, by the purport thereof. But neither this section, nor any other provision of our statute, forbids setting out the instrument forged according to its tenor; and an indictment setting out the instrument forged accord-

ing to its tenor only, would undoubtedly be sufficient. 2 East's Pleas of the Crown, 983. In the indictment before us, the pleader has attempted to set out the note forged according to its purport, as well as according to its tenor. Where the tenor is given, the purport must necessarily appear, as the tenor of an instrument means an exact copy of it, whereas, the purport means "the substance of it, as it appeared on the face of the instrument to every eye which read it." As said by Buller, J., in *Reading's Case*, 2 Leach 672, "the indictment is repugnant in itself; for the name and description of one person or thing, could not purport to be another;" and in *Gilchrist's Case*, upon a conference of ten judges, it was held that "the word *purport* imports what appears on the face of the instrument. It means the *apparent* and not the *legal* import." 2 Leach 753. It would be difficult to say, looking at the face of the instrument alone, that the name of *Jackson Lossene*, purported to be *J. J. Lawson*. The defendant doubtless intended that the signature, forged by him, should be received by the bank as importing an obligation to *J. J. Lawson*, but this is not charged. If the indictment had charged that the note purported to be signed by *Jackson Lawson*, under the rule of *idem sonans*, the charge might not be held to be repugnant. But even though the statement of the purport of the note is repugnant, yet, as the note is set out according to its tenor, we think the indictment is sufficient, under section 1821 of the Revised Statutes, which provides that no indictment shall be deemed invalid on account of any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged.

There is no merit in the second ground relied upon. The indictment states, in substance, that the People's Savings Bank was a banking institution; it states that it had a banking house, and its incorporation was sufficiently shown.

The court instructed the jury that if the defendant falsely made and forged the note in question, with intent to

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injure and defraud, etc., they should convict. Counsel contend that the jury should have been instructed that they must find that the defendant falsely, *fraudulently and feloniously* made and forged the instrument. In a case like this, the instruction need not follow the language of the indictment. If the defendant falsely made and forged the note with intent to injure and defraud, he was guilty as charged in the indictment.

We find no error in the record, which will warrant a reversal of the judgment, and it will, therefore, be affirmed. The other judges concur, except SHERWOOD, J., who is absent.

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*Cox, Appellant, v. ESTEB, et al.*

**Equitable Relief:** MISTAKE: PRIORITY. Where the beneficiary in a mortgage, in which the land intended to be conveyed is misdescribed, brings suit to have such mistake corrected, making the holder of a subsequent mortgage covering the same land a co-defendant with the mortgageor, alleging that the later mortgagee, when he took his mortgage, had knowledge of the mistake in the description of the land in the first mortgage, and asking that the lien of the first mortgage be declared prior to that of the second, if the evidence sustains the allegations of the petition, equity will correct the mistake and declare the lien of the first mortgage prior to that of the second.

*Appeal from Caldwell Circuit Court.*—HON. E. J. BROADDUS,  
Judge.

REVERSED.

*Crosby Johnson* for appellant.

(1) A court of equity has power to correct mistakes in deeds and mortgages. *Bresheban v. Price*, 57 Mo. 442;

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*Rayburn v. Deaver*, 8 Mo. 104. And in the exercise of this jurisdiction it is not restricted to the parties to the deed, but may include purchasers with notice. *Burnside v. Wayman*, 49 Mo. 356; *Young v. Coleman*, 43 Mo. 179. (2) Notice is actual or constructive. Actual notice consists in a knowledge that a deed, though not recorded, was actually made; or of a knowledge of such facts and circumstances as would create in the mind of a man of ordinary circumspection an impression that others had acquired rights in the property. *Speck v. Riffin*, 40 Mo. 405; *Rhodes v. Outcalt*, 48 Mo. 367; *Fellows v. Wise*, 55 Mo. 413; *Eck v. Hatcher*, 58 Mo. 235. A purchaser will be deemed to have notice of facts which would have been ascertained by a man of ordinary prudence. *Muldrow v. Robinson*, 58 Mo. 331; *Ridgeway v. Holliday*, 59 Mo. 444. (3) One purchasing with notice of an equitable mortgage or an agreement to mortgage, takes subject to such incumbrance. *Davis v. Clay*, 2 Mo. 161; *Farras v. Patton*, 20 Mo. 81. (4) To constitute one an innocent purchaser, as against a prior unrecorded conveyance or an equitable title, he must have paid a valuable consideration. *Maupin v. Emmons*, 47 Mo. 304; *Aubuchon v. Bender*, 44 Mo. 560; *Foster v. Holbert*, 55 Mo. 22. The purchase must not only be for value, but the purchase money must be paid before notice. *Paul v. Fulton*, 25 Mo. 156; *Rice v. Runce*, 49 Mo. 231; *Digby v. Jones*, 67 Mo. 104; *Wallace v. Wilson*, 30 Mo. 335. He is not an innocent purchaser for value when the conveyance is taken in payment of a pre-existing debt. *Willard's Eq.*, 256; *Dickinson v. Tillinghast*, 4 Paige 215; *Webster v. Van Steenberg*, 46 Barb. 211; *Padgett v. Lawrence*, 10 Paige 180; *Cary v. White*, 52 N. Y. 138; *Lansey v. Stearns*, 66 N. Y. 157; *Haughwont v. Murphy*, 21 N. J. Eq. 118; *Johnson v. Graves*, 27 Ark. 557; *Orme v. Roberts*, 33 Tex. 768; *Hardin v. Harrington*, 11 Bush. 367; *Baldwin v. Sager*, 70 Ill. 503. (5) The recital in the deed to William, that William was to pay the plaintiff's mortgage, was notice to all claiming under William of plaintiff's mortgage. 2 Washb. on Real Prop., 596;

*Scott v. Douglass*, 7 Ohio 227; *Carver v. Jackson*, 4 Peters 85; *Major v. Bukley*, 5 Mo. 227.

*C. S. McLaughlin* for respondents.

This court cannot take into consideration any errors complained of in the bill of exceptions, for the reason that the bill was never filed in the case. The only filing is the indorsement by the clerk "filed," giving date, etc., but no record was ever made of the filing by the clerk, as required by law. See *Pope v. Thompson*, 66 Mo. 661; *Fulkerson v. Houts*, 55 Mo. 301; *Baker v. Loring*, 65 Mo. 527; *Johnson v. Hodges*, 65 Mo. 589; *Clark v. Bullock*, 65 Mo. 535. When this case was in this court before, it was held there was no evidence to sustain plaintiff's cause of action. 68 Mo. 110. The evidence now is substantially the same as on the former trial. The second mortgage was not a mere voluntary conveyance. *Swift v. Tysen*, 16 Peters 1; *Atkinson v. Brooks*, 26 Vt. 574. Notice is either a question of law or fact. 1 Story's Eq., (Redf. Ed.) § 399. In this case it is a question of fact. This court will not reverse the finding of a trial court if there is any evidence to support it. *Blumenthal v. Torini*, 40 Mo. 159; *Allen v. Richmond College*, 41 Mo. 302; *Faugman v. Hersy*, 43 Mo. 122; *McCune v. Esfort*, 43 Mo. 134. Nor where the issues are tried by the court without a jury. 48 Mo. 43. To establish notice, the proof must be clear and unequivocal. *McMechan v. Griffing*, 3 Pickering 154. Suspicion of notice, though a strong suspicion, is not sufficient. *Hine v. Dodd*, 2 Atk. 275; 6 Barb. 60. Notice must be proved beyond all reasonable doubt. *Rogers v. Wiley*, 14 Ill. 65. It must be direct and positive. *Fort v. Bunch*, 6 Barb. 60; *Jackson v. Given*, 8 Johns. 107. Hearing reports or rumors is not notice. *Colquitt v. Thomas*, 8 Ga. 258. To constitute a binding notice, it must be given by one interested in the property, and in the course of the treaty for the purchase. 2 Sugd. 537, 538; *Rogers v. Hukins*, 14 Ga. 166. Flying reports are many times fables, and



if admitted for sufficient notice, the inheritance of every man might easily be slandered. *Wildgoose v. Wayland Goulds*, 147 Pl. 67. A conveyance in payment of a debt is not voluntary. 1 Story's Eq., § 433, and authorities there cited. A vendor's lien will not be enforced against a mortgage to secure a pre-existing debt. *Bailey v. Greenleaf*, 7 Wheat. 46; *Bank v. Sayer*, 8 Ala. 886; *Adams v. Buchanan*, 49 Mo. 64. There is a distinction between a general assignment for the benefit of creditors, and a particular assignment to specified creditors for their particular security. The former are considered mere volunteers. The latter as any other *bona fide* purchasers. 2 Story's Eq., (Redf. Ed.) §§ 1228, 1229; 4 Kent (12 Ed.) p. 154.

RAY, J.—As we gather from the record, Wm. M. Esteb, in 1872, purchased a farm of 107 acres, in Caldwell county, Missouri, from a man named Merchant. The place was at that time under mortgages from Merchant to Caldwell county, and to the plaintiff Cox. The deed from Merchant to said Wm. Esteb, as appears by the record before us, contained the following clause: "Subject to a mortgage given to Caldwell county, and also to John D. Cox. Which mortgages Esteb assumes and agrees to pay."

At, or about the time, Wm. M. Esteb purchased the land from Merchant, desiring to obtain a further continuance of said loan, he agreed with the plaintiff, that if the plaintiff would release the deed of mortgage given on the land by Merchant, he would execute and deliver to plaintiff a new note and mortgage from himself, on all said lands, to secure the payment of said loan. Under, and in accordance with said agreement, said Wm. M. Esteb, on February 12th, 1873, delivered to plaintiff his said note for the sum of \$1,612 and interest, and executed in lieu of the mortgage from Merchant, which was thereupon released and cancelled, his own mortgage to secure the payment of said note, which was designed and intended to convey the same lands described and conveyed by the Merchant deed of

mortgage to Cox, and said deed from Merchant to Esteb, but by accident or mistake, the 80 acre tract thereof was described in said mortgage from Wm. Esteb to Cox, the plaintiff, as the east half of the northeast quarter of section 20, township 56, range 28, instead of by the correct numbers, to-wit, the east half of the northeast quarter of section 21, same township and range.

In January, 1874, Wm. M. Esteb executed to his father, John M. Esteb, a mortgage on the east half of the northeast quarter of section 21, township 56, range 28, to secure, we believe, the sum of \$900. This, as will be remembered, is the same 80 acres that was in the deed from Merchant to Wm. M. Esteb, and in the mortgage from Merchant to Cox, and was omitted by mistake from the Mortgage from Wm. M. Esteb to plaintiff. The plaintiff brought this action against the defendants to correct this mistake in the description of the land in the mortgage from Wm. M. Esteb to him, and to have the lien thereof declared superior to the lien of the mortgage given to John M. Esteb. Upon the first trial of the cause the plaintiff obtained a judgment, which on appeal by defendant to this court, was reversed and the cause remanded. See 68 Mo. 110. On the second trial, the judgment was in favor of defendants, from which the plaintiff appealed.

Plaintiff has filed an amended petition in the cause, alleging, as was done in the original petition, that John M. Esteb had notice of said mistake in his mortgage, and further setting out the said purchase of the land by Wm. M. Esteb from said Merchant, and a description of the land in said deed, and, also, the clause therein to the effect that the land was subject to said mortgage to plaintiff, which said Esteb thereby assumed to pay off. And further charging that the consideration for the mortgage from Wm. M. Esteb to his father John M. Esteb, was a pre-existing debt, and, also, charging that Wm. Esteb, at the time he executed the deed of mortgage to the plaintiff, was not, and had never been the owner of the east half of the northeast

quarter of section 20, and that J. M. Esteb, the father well knew that fact.

The defendant, Wm. M. Esteb, filed an answer. The separate answer of J. M. Esteb denied, generally and specifically the material allegations contained in the amended petition.

Upon the trial the plaintiff put in evidence said deed from Merchant to Wm. M. Esteb, dated December 10th, 1872, and recorded January 8th, 1873, under which Wm. M. Esteb acquired and held the land. Said deed contained a correct description of the 80 acre tract in controversy, as being situated in section 21, and a particular and correct description of the other land embraced in said Merchant's place, and therein conveyed. It may be further stated, in regard to the evidence, that it showed that Wm. M. Esteb never was the owner of the east half of the northeast quarter of section 20, or any other land in that section, which fact, it is conceded, was not in evidence on the former trial. Such other portions of the evidence, as we deem necessary or important, will be noticed in the proper connection, in the course and progress of this opinion.

The evidence discloses that John M. Esteb, the father, knew that the Merchant place which included the east half of the northeast quarter of section 21, the 80 acre tract in controversy was incumbered by the plaintiff's mortgage. Defendant claims, however, that said John M. Esteb, did not know the boundaries of the Merchant place, so purchased by his son, nor whether it extended over into section 20, or not, and that he supposed the place embraced as much as 200 acres, and the defendant further claims that said John M. Esteb, the father, did not know the amount of the Cox debt, or what amount of lands were embraced in the Cox mortgage. But we think, under the evidence as preserved and set out in the record now before us, that John M. Esteb could not reasonably suppose that it embraced said amount of land, which is about double the amount actually conveyed in the deed to Wm. Esteb. The evidence, we think, tends strongly

to show that he had a substantial knowledge of the boundaries and extent of the place. He had lived more than ten years in its immediate neighborhood. The Merchant place, in fact, almost cornered with his farm; he admits he knew its north and south lines, he designates lands which he says he knew were embraced in it, others that were not, and testifies that he went upon it with his son, on the Sunday before the son traded for it, to advise and consult with him about the trade, and while he does not remember whether the son pointed out the lines to him or not, he states that from the hill they could see over the whole place.

As the son had no other lands, we infer that he lived upon the 80 acres in controversy, and where the house was situated, from the time of his purchase to the date of the mortgage to his father, or for more than a year, and as the relations between them are shown to be intimate and friendly, we think it may be reasonably supposed, that he was, during that time, frequently at his son's place. We do not see how, under the evidence before us, he can be permitted to avail himself of a want of knowledge, in fact, of the metes and bounds of the land included in the Merchant place, or of the fact, as he says he supposed it was, that the Merchant place embraced as much as 200 acres. We think he is concluded upon this point by the evidence now before us, both as to the identity of the land, and as to its quantity and boundaries. *Rhodes et al v. Outcalt*, 48 Mo. 367. Said deed of Merchant to Wm. M. Esteb, dated December 10th, 1872, and recorded January 8th, 1873, and one year and more before the father, John M. Esteb, took his mortgage from his son, and from which it may be added, the witness Thomas Butts, who was acting at the time for John M. Esteb in the examination of the title, got the description of the lands, is, we think with its recitals, touching the 80 acre tract in controversy, conclusive and binding upon John M. Esteb. This deed was one of the muniments of his own title; it was upon record. And the law, we think, imputes to and charges him with a knowledge of what it contains,

touching the tract in question. This deed, as we gather, and the defendant's counsel so states, was not in evidence in the former trial.

The evidence, now before us, further shows, and it is conceded on all hands, that Wm. M. Esteb never owned the east half of the northeast quarter of section 20, the eighty acre tract described by mistake in Wm. M. Esteb's mortgage to plaintiff, which fact, it is further conceded, did not appear in evidence upon the former trial. After testifying that he never owned the east half of the northeast quarter of section 20, Wm. M. Esteb says in his evidence, he did not know whether his father knew who owned it or not. John M. Esteb testifies: "I did not know how much land there was in the Merchant place. I supposed there was 200 acres of it. I knew that William did not own any land, except that got from Merchant. I did not know that he did not own any over in section 20. I did not know the boundaries." The evidence then shows that John M. Esteb knew that his son owned one eighty acre tract, as a part of the Merchant place, to-wit, the eighty in section 21, conveyed by the Merchant deed on which he took his mortgage, and which is the land in controversy. He did not know, as a matter of course, and we do not think his evidence shows that he ever supposed that his son had another eighty acre tract in section 20. His evidence merely goes to the extent, as we think, of showing that, as he did not know the extent or boundaries of the place, he did not know whether some of the land extended into section 20 or not.

Said deed from Merchant to William M. Esteb, also, further contained, as we have before said, a clause that it was made subject to a mortgage in favor of the plaintiff, which Wm. M. Esteb thereby assumed to pay off. *Rhodes v. Outcalt*, 48 Mo. 367. Defendants' counsel concede that John M. Esteb is presumed to have examined this deed, and to have seen its recitals, but claims that his rights could not, in any manner, or to any extent, be affected thereby;



because when he refers to the record of the mortgage from Merchant to Cox, the one recited in the deed, he finds that the same was cancelled one year prior to the time he took his mortgage, when the examination is presumed to have been made. The mortgage from Merchant to Cox, as we gather, had been sometime upon the record, and the evidence before us shows that the mortgage from Wm. Esteb to Cox was, in fact, in lieu of the Merchant mortgage; they were given to secure the same loan; the release of the Merchant mortgage and the execution of the Esteb mortgage to Cox were contemporaneous, and they were, we think, parts of the same transaction. Although cancelled upon the record, the defendant, John M. Esteb, as his testimony shows, knew that the debt had not been paid, nor any part of it. The mortgage from Wm. Esteb to Cox, given in place of it, for the same loan of money and intended by the parties thereto to convey the same lands, is put upon the record and describes the other lands embraced in said deed, from Merchant to Esteb, the same in all respects, as therein described; same parcels, same amount, and but one eighty acre tract, which bore the same numbers, except as to the section. The Merchant deed to Esteb called for but one eighty acre tract located in section 21, and called for no land in section 20, and all the lands called for were made by said deed subject to the claim and mortgage of the plaintiff. When his agent, Thomas Butts, went to the record and reported that he would be safe in taking a mortgage, as there was only a school mortgage on the land, which, we gather from the record, was the mortgage to Caldwell county recited with the plaintiff's in the Merchant deed, John M. Esteb furnished his son the money to pay off and satisfy the school mortgage. But he, also, knew, and was bound to know, that Wm. M. Esteb had purchased the place subject to the plaintiff's mortgage. He testifies that at the time his son William traded for the Merchant place, he knew it was incumbered, and objected to the trade for the reason that he was satisfied, or believed

William would not be able to pay out, and he testified further that he had no reason to believe that his son was paying off the debt, between the time he purchased the place and the date of the mortgage to him; but that, on the other hand, he thought William was running behind-hand on the farm all the while. And further, the evidence shows that the value of the eighty acre tract, where the house stood, and which is involved in this action, was worth \$2,500 or \$3,000, and that the rest of the land was worth some \$10, \$15 and \$20 per acre, which, for the twenty-seven acres, would not exceed the sum of \$400 or \$500 at the outside.

We may, also add, that soon after this suit was commenced, J. M. Esteb, in a conversation with Lemuel Dunn, inquired why he had been sued. Dunn told him there was a mistake in Cox's mortgage; and as he held a subsequent mortgage on the same land, and we were asking that the mistake in the Cox mortgage be corrected, it was necessary to make him a party. He replied that William could not pay the Cox mortgage, and he could not pay it, and supposed he would have to lose his debt. The plaintiff, in his evidence, says that he believed J. M. Esteb was present when the deed from Merchant to William and the mortgage from William to him were made. This, however, J. M. Esteb denies, saying that he thought he had been in town that day, but had gone home. On this point, however, the other evidence and circumstances, all taken together, tend very strongly, we think, to corroborate the plaintiff and to show that J. M. Esteb knew all about it. When we consider all the facts and circumstances of this case, and give to them their full probative force and weight, we think they do not merely point to, but reasonably show, the alleged notice of mistake in plaintiff's mortgage. Although the place was incumbered by the mortgage to plaintiff when his son bought it, subject thereto, and he then believed his son would not be able to pay for it, and, although, he did not believe his son had been paying off the debt between the date of his purchase and the mortgage to him, he dis-

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covers, that while the school mortgage remains in force and unpaid, the plaintiff's mortgage had, by some means been removed from the most valuable portion of the security, although he believed that the plaintiff's debt was not paid in whole or in part. The land substituted for that, which was the plaintiff's only adequate security, was described and located on a section in which his son never owned any land. It is not material, as we think, that John M. Esteb, in his ignorance of the boundaries of the Merchant place, "did not know that his son did not own any land over in section 20." He knew that the son owned no land except the Merchant place, and he did not know that his son owned an 80 tract in section 20, for such it is admitted, was not the fact. The other parcels of land purchased from Merchant by Wm. Esteb were small, and altogether amounted to 27 acres.

The facts and circumstances were, we think, such as to indicate clearly that the Cox mortgage from Esteb as it stood upon the record, was not in its true condition, and did not represent his actual claim upon the land, and that J. M. Esteb must have been aware of that fact. J. M. Esteb on cross-examination said that, "at the time I took my mortgage I did not ask my son William whether the title was clear or not. I asked him no questions. He said for me to examine the records." W. M. Esteb testified that he gave the mortgage to his father, J. M. Esteb, as a second mortgage, but did not tell him so, and that he did not know of any mistake in the mortgage to Cox until the suit was brought.

When Dunn told J. M. Esteb that there was a mistake in the plaintiff's mortgage from his son William, and that as he held a subsequent mortgage on the same land, it was necessary to make him a party to the suit to correct the mistake, he neither denied the mistake nor expressed any surprise at the statement, and did not pretend that his mortgage was entitled to precedence, as he would have done, if, in fact, he was not aware of the mistake, or sup-

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posed that his mortgage had any claim whatever to priority. By his manner and conversation he seems virtually to have conceded the whole case. From this, in connection with all the facts and circumstances in evidence in the cause, we are unable to resist the conviction that the plaintiff's case is fairly made out by ample testimony, and that he is equitably entitled to a judgment as prayed for, correcting said mistake and decreeing priority in favor of his mortgage over that of defendant, J. M. Esteb.

For these reasons the judgment of the circuit court is reversed, and the cause remanded with directions to enter up a judgment and decree in favor of the plaintiff in accordance with this opinion. All concur.

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JUDY V. THE FARMERS & TRADERS' BANK, *Appellant*.

1. **Bank Deposit: TRUST.** A bank which receives a deposit under an agreement to apply it to the payment of a debt due a designated person, cannot divest it from the purposes of the trust by paying it to a different one.
2. **Equity: FINDING OF FACTS BY LOWER COURT, WHEN SUPREME COURT WILL NOT DISTURB IT.** In an equity case where the trial court has the witnesses personally before it, and there is abundant evidence to sustain its finding of facts, the Supreme Court will not interfere and reverse such finding, unless it is clear it should have been otherwise.

*Appeal from Audrain Circuit Court.*—HON. ELIJAH ROBINSON,  
Judge.

**AFFIRMED.**

*Macfarlane & Trimble* for appellant.

In chancery cases this court will review the evidence upon which the finding and judgment of the trial court was made, and reverse, affirm or modify the same according to equity. *Ringo v. Richardson*, 53 Mo. 385; *Moore v. Wingate*, 53 Mo. 398; *Freeman v. Wilkerson*, 50 Mo. 554.

The evidence fails to show that any trust was ever created, or that the bank ever agreed to accept the money and pay the Dyson note. An express trust can only be created by an express agreement between the parties. They are created by the direct or express words of grantor or settler. 1 Perry on Trusts, § 73; *Foster v. Fried*, 37 Mo. 43. Judy, Cassidy and Dyson all deny making any agreement with the bank about this money. Judy says he had nothing to do with it. He supposed "the arrangements were between the bank and Cassidy." Cassidy says, "I gave no directions at all about it." Dyson knew nothing about it. There could then have been no express agreement between the bank and the party who delivered the money to the bank. In fact, it does not appear who did have or exercise any right to control the money before, or at the time, it was deposited. A trust cannot be implied from the evidence in this case. A trust, it is true, may be implied from the acts and declaration of the person in possession of the property, and by his dealings with it. Yet loose, vague and indefinite expressions are insufficient to create the trust. It must be clear that the bank assumed the duties and liabilities. 1 Perry on Trusts, § 86, and authorities cited; *Underwood v. Underwood*, 48 Mo. 528; *Story's Eq.*, § 764; *Willard's Eq.*, 76; *Childs v. W. C. Association*, 4 Mo. App. 74; *Day v. Rath*, 18 N. Y. 458. The money at the time it was received was deposited to the credit of Clark. The legal title never rested in the bank, which was necessary in order to make it a trustee. *Foster v. Fried*, 37 Mo. 43; 1 Perry on Trusts, § 73. The acts of the bank and the dealings with the funds, not only fail to show any recognition of the trust on its part, but show in the very strongest terms the contrary. The evidence shows not only that the bank was not made the trustee by the parties, but that Clark was, either by Cassidy, Judy or each other. The conclusion is irresistible from the evidence, that the money was deposited to Clark's credit by authority of both Judy



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and Cassidy, and if not, by their subsequent acts they ratified the action of the bank in so doing.

*M. Y. Duncan* for respondent.

The bank received the \$2,500 in trust to pay off the Dyson debt. The deposit ticket, as well as every other circumstance in evidence, goes to prove this. A valid trust can be created by parol declarations. Hill on Trustees, (3 Am. Ed.) side pp. 59, 60. The case of *Ringo v. Richardson*, 53 Mo. 385, has no application to a trust in relation to personalty created by parol. The bank took Judy's draft, collected his money, took credit for it, and without his authority, put it to the credit of Clark, and then, after being fully advised of the matter, refused to correct the mistake, and it should now be required to pay the money.

*D. H. McIntyre* and *F. M. Brown* also for respondent.

A trust was created in this case, and being by the direct and express words of the grantor and the head and representative of the trustee, the appellant, and for the benefit of another, it was express or direct. Perry on Trusts, (3 Ed.) § 73; *State ex rel. v. Gambs*, 68 Mo. 289. A trust can be established as to personal property by parol. Perry on Trusts, § 86. But it is a matter of little consequence whether the trust is direct or implied, or was constructive. If there was a trust, then there was obligation on the bank, arising out of a confidence reposed in it, to apply the money left with it according to such confidence, and if the court is satisfied of this, it will not withhold the relief prayed for. Equity will give relief in such cases. Story's Eq. Jur., (12 Ed.) § 29. Any declaration, however informal, evincing the intention with sufficient clearness, will have the effect to establish the trust, and, besides, the bank got the legal possession, and there was a valuable consideration underlying the trust. *Day v. Roth*, 18 N. Y. 448, 453. Again, if the trust was not perfectly created, a court of

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equity can enforce it as a contract, if there is a valuable consideration; wherever there is a valuable consideration, the contract will be executed as near to the intention of the parties as possible. "In such cases effect is given to the consideration to carry out the intentions of the parties, though informally expressed." The deposit ticket shows, beyond question, that a trust was created to pay off the Dyson debt. The deposit ticket and other facts in evidence corroborate the testimony of Judy, that the bank was to pay off the Dyson debt.

*S. M. Edwards* for Cassidy.

Cassidy has the right to enforce the collection of the Dyson note now owned by him out of the Judy land. He thought the land was free from all liens, and was so led to believe by both Judy and the bank. The bank got the \$2,500 for the purpose of paying the Dyson note. "When one accepts a trust or confidence reposed in him by another, he will be converted into a trustee for the use of that person." *Foote v. Foote*, 58 Bar. 258; *Foster v. Fried*, 37 Mo. 37.

HENRY, J.—Plaintiff filed his petition in the Audrain circuit court, alleging that, on the 14th of October, 1872, the plaintiff borrowed of one Dyson \$2,000 for three years, and executed his note of that date, payable three years after, with ten per cent interest per annum compounded annually, and a deed of trust conveying about 1,000 acres of land, as security therefor. About the 1st of January, 1875, he applied to Cassidy to borrow for a term of years \$5,000, and proposed to secure it by a deed of trust on the same land, to which Cassidy assented, on the condition that out of the money so borrowed, plaintiff should cause the Dyson note to be paid, and procure a release of the deed of trust, given to secure it.

Thereupon, plaintiff executed a note for \$5,000 to Cassidy, payable in five years, and a deed of trust, conveying

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said land to secure it, which were delivered to Cassidy, who then authorized plaintiff to draw on him for the money through some bank "upon the express condition that said bank should hold \$2,500 of the amount, and place it to Dyson's credit, and hold it for the use of Dyson to pay off his said note." That plaintiff went to defendant bank which took the draft, agreeing to collect it, and pay to plaintiff \$2,500, and place the balance to Dyson's credit, and pay it to him, and take his release of said deed of trust, and to notify Dyson when the money should be received. That said bank collected the money but had never paid said Dyson's note, and that said note and deed of trust became due, and Dyson when this suit was commenced, was about to proceed to sell said land, and prays that the defendant bank be compelled to pay off and discharge said Dyson note, and procure a release of said deed of trust, and for general relief.

The answer of the bank, is that said sum of \$2,500 was received on the 4th of January, 1875, as deposit money, and placed to the credit of John P. Clark. That plaintiff afterward, while said money was still in bank to Clark's credit, was informed of the fact, and, also, that Clark could draw it out, and he made no objection thereto. That it remained in the bank to Clark's credit for six months, without any objection from plaintiff. That afterward it was paid to, and used by Clark. That the bank received it as a deposit only, and, by the direction of plaintiff and Cassidy, placed it to Clark's credit.

This answer was denied by the plaintiff. The court found the issues for plaintiff, and rendered a decree in conformity with the prayer of the petition, from which the bank has appealed.

The only questions in the case are questions of fact. Did the bank receive the \$2,500, under an agreement to pay off the Dyson note, or was it authorized by the plaintiff or Cassidy, to place it to the credit of John P. Clark. Except the entries in the bank book, there is not a particle of

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testimony, that either Cassidy or plaintiff authorized the deposit to Clark's credit, and both plaintiff and Cassidy testified, that they did not authorize it. The bank officers, also, testified that, when informed that the money was there to the credit of Clark, plaintiff was surprised, and remarked that it "was not his understanding of the arrangement." We think it clear from the evidence, that the bank had no authority to place the money to Clark's credit.

The other question is not so easily answered, but still, we are of the opinion that the weight of evidence is against the bank. The plaintiff testified that the money was to be applied to the Dyson note. That Ringo told him that it had been placed to Dyson's credit, and that the bank would notify him that it was there for him, and would pay the same rate of interest that plaintiff was paying Dyson until the note held by Dyson should be paid off. Clark testified that Mr. Ringo, president of the bank, first informed him that the money was to his credit. This was in January, 1875, and that after Ringo's death, which occurred February 3rd, 1875, Garrard, who was acting as cashier of the bank, told him that Cassidy had instructed him to place the money to the credit of the bank. If there was no authority to make the deposit to Clark's credit, then, in order to effect the object contemplated by Cassidy and Judy the money must have been deposited, either to the credit of the bank, or to Dyson's credit. It is manifest in any view to be taken of the case, the plaintiff was not to have control of the money, and that the bank was aware of that fact, is evidenced by its placing the money to the credit of Clark. There being no authority for such a disposition of the money, the obvious duty of the bank was to place it to the credit of Dyson, or to its own credit, and, if to Dyson's credit, to notify him at once that it was there for him; or, if to its own credit to hold it until the Dyson note became due and then pay it off. The bank never notified Dyson that the money was there for him, and one significant fact, is that Mr. Clark was requested by the bank to notify Dyson. If

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the deposit to Dyson's credit was authorized by Cassidy, or Judy it was no concern of the bank whether Clark notified Dyson or not. It may be said it was done in order that the bank might stop the interest it agreed to pay until Dyson was paid, but this is a concession that the plaintiff's testimony on that subject is true. It is unnecessary to review more minutely the testimony. The court below found that the bank agreed to pay the Dyson note, and when, as in this instance, there is abundant evidence to sustain the finding, we are not inclined to set it aside, unless there is such a preponderance of evidence to the contrary, as makes it manifest that the court should have found otherwise. The principal witnesses were personally before the court, which was, therefore, better able than we to determine the credit to which they were respectively entitled.

That plaintiff was informed that the money was placed to Clark's credit and made no attempt to change it, does not estop him from complaining of the breach of the agreement testified to by him. He did not assent to it, but on the contrary, complained of it to the bank, and the bank had nothing to do but to cancel that entry and deposit the money according to the agreement. It does not appear that the bank had entered it upon a pass book held by Clark, or, in any other manner, dealt with Clark so as to enable him, to dispose of it to the prejudice of the bank. The deposit ticket reads as follows:

"For account of John P. Clark. Pay off deed of trust on John A. Judy's land favor of Dyson, \$2,500." At the trial this ticket was in possession of the bank. It does not appear that Clark ever had it, or a duplicate in his possession, and, if he had, he could not have transferred it to any one who could have held the money discharged of the trust. The judgment is affirmed. All concur.



DOUGHERTY V. ADKINS, *Appellant*.

**Practice:** DECREE: PRAYER FOR TITLE. A decree should conform to the pleadings and evidence in a cause.

In a suit by bill in equity praying that the title to certain lots, conveyed to defendant by sheriff's and trustee's deeds, be vested in plaintiff, and that defendant be required to account for rents received by him thereon, it is error to enter against defendant a general personal money judgment.

*Appeal from Clay Circuit Court.*—HON. GEO. W. DUNN, Judge.

REVERSED.

*Henry Smith* for appellant.

This suit is a proceeding by bill in equity, praying that the title to certain lots, conveyed to defendant by a sheriff's deed, and, also, by a trustee's deed, be vested in plaintiff, and that defendant be required to account for rents received by him thereon. It was error, therefore, in the court to enter up a common law judgment for \$537.23, and award against defendant a general execution. The bill does not deny that the money paid by defendant for the lots was his own. The money being his own, there cannot be a resulting trust to plaintiff or any one. The bill does not state facts sufficient to constitute a cause of action. 1. It is not alleged that the lots were bought with the money of the beneficiaries in the chattel mortgage, and there is no other allegation that would create an implied or resulting trust. 2. Where a trustee purchases in the name of a third person with trust funds, the resulting trust will not be to himself, but to his *cestui que trust*. *Kelly v. Johnson*, 28 Mo. 249, 252; *Russell v. Allen*, 10 Paige 249. 3. The bill does not show any right to plaintiff to sue defendant. 4. It does not show that a common law action would be unavailing and insufficient.

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Dougherty v. Adkins.

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*Samuel Hardwicke and James M. Sandusky* for respondent.

The judgment was authorized by the pleadings and the evidence. "When a court of equity obtains jurisdiction of a cause, it will retain the same to do full and complete justice between both parties; it will, as far as possible, prevent multiplicity of actions, and will not turn a party out of court where his rights may be adjusted and determined without that measure." *Corby v. Bean*, 44 Mo. 381. "It will not content itself in this regard by any half way measures; it will not declare that a party has been defrauded of his rights, and then dismiss him with a bland permission to assert, at new cost and further delay, those rights in another forum." *Real Est. Savings Inst. v. Collonius*, 63 Mo. 295, and cases cited. The petition states a cause of action. The appeal is frivolous, and judgment should be affirmed with ten per cent damages. *Estey v. Post*, 76 Mo. 411.

EWING, C.—The plaintiff commenced suit by filing the following petition:

"Plaintiff states that heretofore, to-wit, on the 18th day of June, A. D., 1875, one James G. Adkins executed and delivered unto Lewis B. Dougherty, plaintiff in the above entitled cause, his certain deed of trust, dated the day and year aforesaid, and filed in the office of the recorder of deeds, on said day and year aforesaid, by which he granted, bargained and sold, aliened, transferred, and conveyed unto said Lewis B. Dougherty a large quantity of goods and chattels of great value, to-wit, of about the value of \$——— a full and particular description of which will be found in said deed of trust, recorded in book one (1) at page 72, of the chattel records in and for said Clay county; that said conveyance was made to said Dougherty in trust for the following uses and purposes, to-wit: To indemnify one Abram T. Litchfield, Darwin J. Adkins, Lewis B.

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Dougherty, William G. Garth and Robert S. Adkins, as sureties for the said James G. Adkins on a certain promissory note executed by him and by them to The Commercial Savings Bank of Liberty, Mo., for the sum of \$2,500 dated May 15th, 1875; and to indemnify one James M. Keller and Robert S. Adkins, as sureties for the said James G. Adkins on a note executed by him and by them to said bank for the sum of \$2,046.54, dated November 11th, 1869; and to secure the indebtedness of James G. Adkins to said bank for the sum of \$3,540, as a member of the copartnership of Blakemore, Harper & Co., on a note executed by said firm to said bank for said sum, dated March 8th, 1873; and to secure the indebtedness of the said James G. Adkins, to said bank for the sum of \$510, evidenced by his note for said sum, dated September 7th, 1874; and to secure divers other claims in favor of said Bank and against said James G. Adkins, as will more fully appear by reference to said deed of trust aforesaid.

“Plaintiff states that by agreement between said James G. Adkins and the said Lewis Dougherty, trustee, as aforesaid, the said James G. Adkins was to sell said goods and chattels and turn the proceeds over to said trustee, to be applied by said trustee on the said claims hereinbefore stated, and toward the liquidation of the same; that in pursuance of said agreement, the said James G. Adkins proceeded to sell and did sell large quantities of said goods and chattels, and turned the proceeds thereof over to said trustee, to be applied on said claims aforesaid, except a certain note for the sum of \$351.75, dated July 15th, 1875, due thirty days after date, executed by one Michael Knight and Patrick Dennen to said Jas. G. Adkins, which said note was executed by said Michael Knight in consideration of certain of said trust goods and chattels sold by said James G. Adkins to said Knight.

“Plaintiff states that on the 19th day of January, 1876, said James G. Adkins indorsed, transferred and delivered said note to said Robert S. Adkins, for the purpose of col-

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lecting said note and turning the proceeds thereof over to said Dougherty, trustee, as aforesaid, to be applied by him in liquidation of the said claims secured by said deed of trust aforesaid. Plaintiff states that at the September term, 1876, the said Robert S. Adkins instituted suit in the circuit court of Clay county, Missouri, against said Patrick Dennen, on said promissory note, by attachment, the said Patrick Dennen being a non-resident of the State of Missouri; that under the writ of attachment issued in said cause, the sheriff of Clay county, Missouri levied upon and attached the following described real estate, situate, lying and being in Clay county, Missouri, to-wit, lots numbered one hundred and eighty-nine (189) and one hundred and ninety (190), as marked and numbered on the original plat of the town, now city, of Liberty; that at the March term, 1877, said Robert S. Adkins recovered judgment in the said Clay county circuit court, against said real estate aforesaid, for the sum of \$412.61, the said Patrick Dennen having been duly notified of said attachment and the pendency of said suit by publication; that by said judgment a special *fiery facias* was ordered to issue for the sale of said real estate, and that at the September term, 1877, of said Clay county circuit court, said real estate was duly sold by the sheriff of Clay county, Missouri, during the sitting of said court, and at said sale said Robert S. Adkins became the purchaser thereof, at and for the price and sum of \$480; and that said defendant, Robert S. Adkins, purchased said real estate for the use and benefit of the beneficiaries in said chattel mortgage as aforesaid, and that John S. Groom then sheriff of Clay county, Missouri, executed, acknowledged, sealed and delivered to said defendant Robert S. Adkins, a deed for said lots. Plaintiff further states that said deed is duly recorded in the office of the Recorder of Deeds for Clay county, Missouri, in book 46, page 512; and that previous to the day of sale aforesaid, the said Patrick Dennen executed, acknowledged, sealed and delivered to one David D. Miller his mortgage deed upon said property, to-wit, on the

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15th day of November, 1875, to secure to said Miller a note therein described; and that on the 20th day of December, 1877, one James T. Riley, administrator of the estate of David D. Miller, deceased (the said Miller having died), under and by virtue of the power contained in said deed of mortgage, and at the request of defendant, and for the purpose of paying off balance due on said note, sold said lot at public sale, in conformity with said mortgage, and the said Robert S. Adkins became the purchaser thereof at and for the sum of \$168.70; and in conformity with said sale, James T. Riley, administrator of said Miller, deceased, executed, acknowledged, sealed, and delivered his deed to said lot to defendant; and plaintiff charges the fact to be that said Robert S. Adkins purchased said lot at the last mentioned sale, for the use and benefit of the beneficiaries in said chattel mortgage, and that said lots, or their proceeds when sold, were to be turned over by said Robert S. Adkins to plaintiff, as trustee aforesaid. Plaintiff further states that Robert S. Adkins has collected the rents, and been in possession of said lots for over three years, and that said lots have been rented by him for \$180 annually, and that said Adkins, the defendant, has received, by way of rents more than sufficient to pay off and discharge any individual moneys he may have advanced for plaintiff, as trustee aforesaid; and that defendant has refused, and still refuses to deed or convey said property to plaintiff, as trustee, or to sell said property and pay over the proceeds thereof to plaintiff, as such.

“Wherefore plaintiff prays that the title to said property be invested in plaintiff, and that defendant be required to account for rents received by him, and that such other and further judgment and orders be made in the premises as may be just and proper.”

The answer was a general denial. It is manifest that the petition in this case contains allegations which, if true, would entitle the plaintiff to equitable relief. The plaintiff's interest in the property conveyed to him by James G.



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Adkins, was that of a trustee. Robt. S. Adkins received the note on Knight and Dennen as a trustee, for the purpose of collecting for the benefit of plaintiff. Defendant bought the Dennen land with the Knight and Dennen note, and took the title in his own name. This, it is alleged, he held for the use of plaintiff's beneficiaries and that it, of right, belongs to them, having been purchased with the proceeds of the property conveyed to plaintiff by James G. Adkins. Plaintiff then in his petition prays, that the title to said property be vested in plaintiff, and that defendants be required to account for rents received by him, etc. The chancellor then heard the evidence, about which there seems to have been little controversy, and found the facts as charged in the petition to be true; and that the amount of the trust note he, defendant, had received was the amount he bid at the sale for the Dennen land, which was less the costs of suit, \$537.23, and that the said real estate was paid for by said defendant "with the trust note aforesaid, indorsed to him as aforesaid by crediting the amount by him bid for said real estate upon said judgment, and that there was no consideration moving from said Robert S. Adkins for the said real estate except the said trust consideration." Judging from the finding of facts by the court, it would seem that the sum paid by the defendant at the mortgage sale, and the receipts for rents by the defendant, and his expenditures, as the evidence tended to establish these facts, were not taken into consideration by the court. The court below then entered a general personal money judgment against the defendant, altogether disregarding the pleadings in the case under which, and the evidence, the plaintiff was entitled to a decree for title to the land upon conditions. *Baldwin v. Whaley*, 78 Mo. 186; *Bank of Kentucky v. Poyntz*, 60 Mo. 531.

The judgment of the circuit court is, therefore, reversed, and the cause remanded with instructions, upon further proceedings, to ascertain the amount of the personal money paid out by defendant on account of his purchase at

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the mortgage sale, as well as the amount of taxes and necessary repairs paid by defendant on account of said real estate. On the other hand, ascertain the amount of rents collected by defendant and adjust the balance between these accounts. If it be found that the rents received by defendant were sufficient to reimburse him the amount so found to have been paid by him, then to decree the title to the said land in plaintiff. If on the other hand it be found that the rents received were not sufficient to reimburse him, then decree that the deficiency be paid to him by the plaintiff, and vest the title to the real estate in plaintiff according to the prayer of his petition. All concur.

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THE STATE V. HECKLER, *Appellant*.

1. **Dramshop Keeper, Who is.** A dramshop keeper is a person licensed by law to sell intoxicating liquors in any quantity not exceeding ten gallons. R. S. 1879, § 5435.
2. **Criminal Law: SELLING INTOXICATING LIQUOR ON SUNDAY.** In a prosecution on an indictment, under Revised Statutes 1879, section 5456, for selling intoxicating liquor, as a dramshop keeper on Sunday, without proof that the person charged had a dramshop keeper's license, it is error to convict of the offense in manner and form as charged in the indictment. But, under the provisions of Revised Statute section 1655, a conviction may be had under Revised Statute section 1581, if a sale on Sunday be proved.
3. ———: **PRINCIPAL AND AGENT.** A principal will be held criminally liable for a sale of intoxicating liquor by his agent, unless he shows that such sale was not authorized by him, and was forbidden.

*Appeal from Henry Circuit Court.*—HON. J. B. GANTT,  
Judge.

REVERSED.

*R. C. McBeth and F. P. Wright* for appellant.

The indictment is for selling intoxicating liquor on Sunday, as a dramshop keeper. It devolved upon the State to show that defendant had a license as a dramshop keeper, and failing to show this, the conviction was erroneous. There is no evidence that the defendant authorized her clerk to sell liquor on Sunday, or that she sanctioned the same in any way. The principal is not liable for the unauthorized and unsanctioned acts of the agent, especially in criminal cases.

*D. H. McIntyre*, Attorney General, for the State.

The State was not called upon to prove that defendant had a license as a dramshop keeper. The indictment might as well have been drawn under section 1581, as under section 5456. The former section forbids every person from selling on Sunday any distilled liquor, and the State could not be compelled to elect as to any particular Sunday. *Frasier v. State*, 5 Mo. 536; *State v. Findley*, 77 Mo. 338. "When a clerk, in the absence of his employer, while engaged in the business of his employer, makes a sale, or does any other act in connection therewith, which the law forbids, a *prima facie* case is made out against the employer, and unless rebutted, this fact will furnish a sufficient basis for a verdict of guilty." *State v. Reiley*, 75 Mo. 521, and authorities cited.

HOUGH, C. J.—The defendant was tried, convicted and fined \$50, under an indictment drawn under section 5456, Revised Statutes, which is as follows: "Any person having a license as a dramshop keeper, who shall keep open such dramshop, or shall sell, give away, or otherwise dispose of, or suffer the same to be done upon or about his premises, any intoxicating liquors, in any quantity, on the first day of the week, commonly called Sunday, shall, upon

conviction thereof, in addition to the penalty now provided by law, forfeit such license, and shall not be allowed to obtain a license to keep a dramshop for the term of two years next thereafter."

"The penalty alluded to in the foregoing section, as being now provided by law," is contained in section 1581, which is as follows: "Every person who shall expose to sale any goods, wares or merchandise, or shall keep open any ale or porter house, grocery or tippling shop, or shall sell or retail any fermented or distilled liquor on the first day of the week, commonly called Sunday, shall, on conviction, be adjudged guilty of a misdemeanor, and fined not exceeding \$50."

The cause was tried by the court, without the aid of a jury, and the testimony is amply sufficient to support a finding, that the defendant's barkeeper sold a drink of whisky, on Sunday, to the prosecuting witness. A dramshop keeper is defined by section 5435 to be a person permitted by law, being licensed, as provided by the chapter regulating dramshops, to sell intoxicating liquors in any quantity not exceeding ten gallons.

As the defendant was charged in the indictment with having sold intoxicating liquors on Sunday, as a dramshop keeper, and as there was no testimony whatever that she had a license as such, she was improperly found guilty of the offense in manner and form as charged in the indictment. But it does not follow that she should have been acquitted.

Two classes of offenders, against the law prohibiting the sale of intoxicating liquors on Sunday, are recognized by the statutes and different punishments are meted out to each.

If the person who sells intoxicating liquors on Sunday be a dramshop keeper, as defined by law, he is subject to a fine of \$50, and a forfeiture of his license, and to a deprivation of the right to obtain a license for two years thereafter. All other persons who sell intoxicating liquors on

Sunday are subject only to a fine of \$50. So that the simple charge of selling intoxicating liquors on Sunday is, necessarily, included in the larger charge that the defendant sold intoxicating liquors on Sunday, as a dramshop keeper; and under section 1655 of the Revised Statutes, if the testimony be insufficient to warrant a conviction of the charge of selling as a dramshop keeper, the defendant may, nevertheless, be convicted, if a sale on Sunday be proved. In other words, a person indicted under section 5456, if not shown to be a dramshop keeper, may be convicted under section 1581, if a sale on Sunday be proved. But, in such case, the verdict should show that the defendant is found guilty not "as charged in the indictment," but according to the fact; that is, guilty of selling intoxicating liquors on Sunday, but not as a dramshop keeper. Otherwise the judgment might be used to deprive a party, who was not a dramshop keeper at the time of selling on Sunday, of the privilege of obtaining license for two years thereafter.

The verdict in this case being, guilty as charged, without any evidence that the defendant was a dramshop keeper, that she had a license as such, the judgment of the circuit court must be reversed.

It is also objected on behalf of the defendant, that there is no testimony that she authorized the sale made by her barkeeper. It was for the defendant to show that it was not authorized, and was forbidden. *State v. Reiley*, 75 Mo. 521.

For the error above indicated, the judgment will be reversed and the cause remanded. The other judges concur.



THE STATE V. MADDEN, *Appellant*.

1. **Pleading, Criminal:** INDICTMENT. An indictment which sets forth all the facts necessary to constitute an offense, as created and defined by statute, is sufficient.
2. **Criminal Law:** CONSTITUTION: MARRIAGE. The sections of the statute, (R. S., §§ 1546, 3270,) making it a misdemeanor for any one having authority to join others in marriage, to willfully fail to make return of any marriage solemnized by him to the recorder of the proper county, is not unconstitutional.

*Appeal from Ste. Genevieve Circuit Court.*—HON. J. D. FOX,  
Judge.

AFFIRMED.

No brief for appellant.

*D. H. McIntyre*, Attorney General, for the State.

It is not pointed out wherein the section of the statute conflicts with any provision of the State constitution, nor can anything be found in the constitution prohibiting the legislature from enacting such a law. The enactment of such legislation violates none of the inalienable rights of the citizen guaranteed by the bill of rights. "The right to regulate marriage, the age at which persons may enter into that relation, the manner in which the rites may be celebrated, and the persons between whom it may be contracted, has been assumed and exercised by every civilized and Christian nation." *State v. Jackson*, 80 Mo. 175. "There can be no doubt as to the power of every country to make laws regulating the marriage of its own subjects, to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying." *Brook v. Brook*, 9 House of L. R. 223; *Francois v. State*, 9 Tex. App. 144. If the State has control over the subject of marriage to the extent indicated by the above authorities, it certainly can provide and enforce a mere police regulation,

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such as that created by section 1546, *supra*. Similar enactments have been upheld elsewhere. *State v. Horsey*, 14 Ind. 186; *State v. Pierce*, 14 Ind. 302.

NORTON, J.—At the November term, 1880, of the circuit court of Ste. Genevieve county, defendant was indicted for failing to return a certificate of marriage to the recorder of said county. He was tried, found guilty, and fined \$20, and brings the case to this court on appeal, and assigns for error, the action of the trial court in overruling a demurrer to the indictment. The grounds alleged in the demurrer are, that the facts alleged in the indictment do not charge any offense known to the law, and because the statute upon which the indictment is founded is unconstitutional and void.

Omitting the formal parts of the indictment it charges that defendant "at the county of Ste. Genevieve, on the — day of May, 1880, he being then and there a priest of the Roman Catholic church, and having authority to join others in marriage, did join in marriage William Hoffman, of the town of St. Mary, and county aforesaid, and Rosa Rozier, of said town, and did then and there unlawfully and willfully, fail, neglect and refuse to transmit to the recorder of the county of Ste. Genevieve the certificate of the marriage aforesaid."

This indictment is based upon section 1546, Revised Statutes, which is as follows: "If any person, authorized to solemnize any marriage, or whose duty it may be to make return of any marriage, shall willfully fail to make such return, or shall make a false return of any marriage, or pretended marriage, to the proper recorder \* \* such person so offending, shall be deemed guilty of a misdemeanor."

Section 3270 provides: "Every person having authority to join others in marriage, shall keep a record of all marriages solemnized before him, and, within three months, transmit a certificate of every marriage, containing

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both christian names and surnames, to the recorder of the county, in which such marriage took place \* \* \*." It will thus be seen that said section 3270 imposes upon every one, having the authority to perform the marriage ceremony, the duty of transmitting to the recorder of the county in which the marriage takes place, a certificate of such marriage; it will, also, be seen that section 1546 makes it a misdemeanor for any person whose duty it is to make return of any marriage, to willfully fail to discharge the duty. The indictment in question sets forth all the facts necessary to constitute the offense created and defined by the above statutory provisions, and is, therefore, sufficient.

We are at a loss to perceive any grounds for the claim made that these statutes are unconstitutional. "There can be no doubt as to the power of every country to make laws regulating the marriage of its own subjects, to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying." *Brook v. Brook*, 9 House of L. R. 223. "The right to regulate marriage, the age at which persons may enter into that relation, the manner in which the rites may be celebrated, and the persons between whom it may be contracted, has been assumed and exercised by every civilized and Christian nation." *State v. Jackson*, 80 Mo. 175; *State v. Pierce*, 14 Ind. 302.

While the statute law of this State authorizes certain persons to solemnize marriages, it does not require or make it obligatory upon them to do so; they may, or not, as they choose, exercise the privilege, but when they do perform the marriage ceremony, then they are required to preserve the evidence of the fact in such manner as the law provides. We are of the opinion that the statute in question, imposing a penalty for the non-observance of those requirements, so far from being unconstitutional, is a wise and salutary one. Judgment affirmed in which all concur.

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Hayes v. Miller.

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HAYES *et al.* v. MILLER, *Appellant.*

1. **Pleading: PARTIES: INSANE PERSON: GUARDIAN.** An insane husband who is under guardianship, cannot be joined in a suit with his wife. It is the duty of the guardian of an insane person to prosecute and defend all actions instituted in behalf of or against his ward.
2. ———: ———: **MARRIED WOMAN.** A married woman cannot maintain an action of replevin, for the recovery of possession of personal property, in her own name.

*Appeal from Greene Circuit Court.*—HON. W. F. GEIGER,  
Judge.

REVERSED.

*O. H. Travers* for appellant.

The plaintiff, Martha Hayes, being married ought to have joined her husband with her at the institution of the suit. R. S. 1879, § 3468. A judgment in her favor would have been a nullity. Consequently she had no valid action against defendant, and the justice could not so amend as to give her one. *McDowell v. Morgan*, 33 Mo. 555. It was error for the court to require defendant to go to trial after sustaining his motion to compel plaintiffs to file a good and sufficient bond, and they had refused to comply with the order of the court. It was the duty of the court to dismiss the case. R. S., § 3851. Section 2891 applies to justices' courts only.

No brief for respondent.

EWING, C.—Martha Hayes, as plaintiff, commenced this suit in her own name, before a justice of the peace to recover possession of a hog alleged to belong to her. Pending the trial before the justice, on motion of plaintiff, Joseph Hayes, the husband, was made a party.

There was a verdict and judgment for the plaintiffs,

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and an appeal to the circuit court, when the defendant filed his motion to dismiss the case for misjoinder of parties, in that Joseph Hayes at the time he was made a party was an insane person, under guardianship, and had not capacity to sue in his own name. On this motion, the defendant offered in evidence the proceedings of the probate court, showing the trial of the sanity or insanity of the plaintiff Hayes, the verdict of the jury, and guardian's bond. This motion was overruled by the court, and the defendant appealed to this court.

I. The statute provides: "It shall be the duty of every such guardian (of an insane person) to prosecute and defend all actions instituted in behalf of or against his ward." There seems to have been no doubt but, that Joseph Hayes was under guardianship as an insane person, and the statute in such case being imperative, the motion to dismiss should have been sustained. R. S. 1879, § 5804: *Reed v. Wilson*, 13 Mo. 29.

II. Martha Hayes, the wife, could not maintain this suit in her own name. R. S. 1879, § 3468; *Plummer v. Trost*, *post*, p. 425.

The judgment is reversed and the case remanded. All concur.

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PLUMMER *et al.* v. TROST, *Appellant*.

1. **Husband and Wife:** HER SERVICES RENDERED ANOTHER, WHEN HER SEPARATE EARNINGS. Services performed by a wife, for another for compensation, are presumed to be given on the husband's behalf. This was the case at common law and has not been changed by statute, and to rebut such presumption, the wife must show that the services were rendered under circumstances indicating an intention or understanding that she should receive the pay therefor.
2. **Partnership.** An agreement between the owner of a farm and another, by which the latter and his wife in conjunction with the owner shall work together on the farm, the proceeds of their joint



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work and labor to be shared together, is a contract of partnership. It is not a contract for hire and wages, and cannot be sued on as such.

*Appeal from Jefferson Circuit Court.*—HON. L. F. DINNING,  
Judge.

REVERSED.

W. H. H. Thomas for appellant.

The court erred in refusing to instruct the jury, at the close of plaintiffs' case, that plaintiffs could not recover on the pleadings and evidence. Plaintiffs' evidence showed that Mrs. Plummer, when she rendered the alleged service for appellant, was the wife of Chris. Kleisner, and she earned no wages by her separate labor, as contemplated by section —, of an act in regard to married women, passed in 1876. Sess. Acts 1875, p. 61, § —. There should have been a contract with her, or husband, that she should perform the service, and enjoy the wages received as her own, or she should have performed the service under such circumstances as the court might infer she and husband both intended for her to receive and retain her wages for herself. Working in her husband's family, aiding him, and in conjunction with him, will not be sufficient to entitle her, under the above statute, to her separate earnings. *Reynolds v. Robinson*, 34 N. Y. 589; *Bean v. Kiah*, 4 Hun 171; *Adams v. Curtis*, 4 How. 164; *Fier v. Railroad Co.*, 49 N. Y. 47; *Kirkbeck v. Ackroyd*, 11 Hun 365; *Hazelbaker v. Goodfellow*, 64 Ill. 283; *Lominer v. Kelly*, 10 Kas. 298; *McClusky v. Sav. Ins.*, 103 Mass. 300; *Kelly v. Drew*, 12 Allen 107; *Wells' Separate Property of Married Women*, §§ 126, 127, 128, and cases cited; *Hunt v. Spencer*, 20 Kas. 131; *Coughlin v. Ryan*, 43 Mo. 99; *Kidnell v. Kirkpatrick*, 70 Mo. 214; *Welch v. Welch*, 6 Mo. 57; *National Bk v. Sprague*, 5 C. E. Greer.

*Byrnes & McMullin* for respondents.

PHILIPS, C.—This action was begun in the name of Katie Kleisner against the defendant. She having married, *pendente lite*, to J. B. Plummer, the action was continued in their joint names. The petition alleged that the defendant owed said Katie the sum of fifty dollars for money loaned him by her, also, that defendant owes her \$330 for work done by her for defendant at his special instance and request. An account of these items was filed with the petition.

The answer tendered the general issue. It then pleaded that the plaintiff, Katie, at the time of the transactions in controversy, was the wife of Christ. Kleisner, and that she and her husband, with their children, came to defendant's home to live as members of his family, and for their services in and about the premises they should receive their board and bed, as also their clothing and medical attention. The answer tendered the issue that plaintiff being a *femme covert* could not recover for her services rendered to defendant.

The cause was submitted to a jury for trial. The only witnesses testifying to the arrangement between plaintiff and defendant were themselves. It appears that the plaintiff and her husband, Christ. Kleisner, lived in Ste. Genevieve county prior to January, 1876. They had a little home there, but were quite poor. They then had two children. According to plaintiff's testimony the defendant in 1875 wrote to them to sell out and come to his home and live with him. At first they declined, but finally consented after much solicitation on defendant's part. The letters were lost. Defendant's proposition to them was that if they would come they would work his farm and live together; that what they made together "we could have together, that what we could earn we could have." She denied that they were to work for defendant on the terms

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alleged in the answer. She, also, stated that when they went to defendant's home he said he would build them a house and give them a piece of land, which he never did. She made proof of the reasonable value of her services. The evidence of plaintiff and other witnesses showed that she and her husband, in connection with defendant, carried on the farm, that the plaintiff worked constantly in the house as cook and otherwise, and, also, on the farm as a hand. They raised valuable crops, etc. While at defendant's home another child was born to her. The expenses of the entire household, which were comparatively inconsiderable, were borne by defendant. Nothing was paid her or her husband by defendant for their labor. They worked for him from January, 1876, to February, 1879, when the husband died. She continued to work there until July, 1879, when she left. She, also, stated that \$50, which was a part of the proceeds of their farm, sold in Ste. Genevieve county, they loaned to defendant. Defendant's testimony tended to sustain the allegations of his answer. The jury found the issues for the plaintiff and returned a verdict for the sum of \$168. After an ineffectual effort for a new trial, the defendant appealed to this court.

I. We do not see how this judgment can stand. The plaintiff, Katie, at the time of rendering the services sued for was a married woman, with the exception of about five months. At common law the wages for the services of the wife belonged to the husband. Schouler H. & W., 294, 295. The presumption is, that any services performed by the wife for another for a compensation, are rendered on the husband's behalf. It is, therefore, incumbent on the wife to show that the services were rendered under circumstances indicating an intention or understanding that she should receive the pay therefor. *Morgan v. Bolles*, 36 Conn. 175, 176. Even under statutes so far innovating upon the common law as to enable married women to hold in their own right property acquired by purchase, grant or gift, the earnings of the wife are not drawn within its operation by implication. *Rider*

*v. Hulse*, 33 Barb 264; *Bear v. Hays*, 36 Ill. 280; *Hoyt v. White*, 46 N. H. 45. The act of 1875 (Laws of Missouri, 1875, pp. 61, 62) provides that: "Any personal property, including rights in action, belonging to any woman at her marriage, or which may have come to her during coverture by gift, bequest or inheritance, or by purchase with her separate money or means, or be due as the wages of her separate labor, etc., shall \* \* \* be and remain her separate property." While this statute gives the wife her wages, it is to be observed that it is limited to the wages "of her separate labor." The very foundation, therefore, of her right to such wages depends upon the fact whether the services were for her "separate labor." Under similar statutes allowing the wife her earnings, the accepted construction is, that when her labor is performed on account of, or in connection with the husband, or is bestowed on his business, or where there is nothing in the terms or circumstances of the contract to indicate an intention or purpose to concede to her the fruit of the given labor, the statute does not apply. *Beau v. Kiah*, 4 Hun 171; *Reynolds v. Robinson*, 64 N. Y. 589; *Hazebaker v. Goodfellow*, 64 Ill. 238.

While the husband may, by his assent, concede to the wife the wages of her labor, so that she may hold it even against his creditors, yet where the work and business are carried on by husband and wife in co-operation, the labor of the husband being united with that of the wife, the business and its proceeds will be regarded as belonging to the husband. It will be subject to his debts and, on his death, pass to his administrator. *National Bank of the Metropolis v. Sprague*, 5 C. E. Green 13. Where the husband and wife are living together and mutually employed in providing a support for themselves and children, and there is neither any express agreement, nor anything to indicate at the time an intention on her part to separate her earnings, and nothing to indicate an assent of the husband thereto, the right of property and action therefor, belong to the

husband. *Birkbeck v. Ackroyd*, 74 N. Y. 356. See, also, Wells Sep. Prop. Mar. Wom. §§ 127, 128; *McCoy v. Hyatt*, 80 Mo. 130, and authorities cited therein. There is nothing in the facts of the case under consideration to except it from the operation of these principles. The proposition of defendant for the services of Kleisner and wife was made to the husband. It was, according to plaintiff's own testimony, the joint labor of husband and wife contracted for, and not the separate services of the wife. Their remuneration was to come from the joint product of their united labor and husbandry. Her testimony was that defendant said "he could not afford to hire hands and pay them every month cash, but he said we should work together, and what we raised together we should have together, and we could have what we could earn." It then was a joint contract by which husband and wife, in conjunction with defendant, were to carry on the farm, and they were to have an interest in what all together produced. Was this arrangement anything more or less than a partnership between the defendant and husband for farming together and sharing the proceeds according to labor and production? How is it permissible for the wife in the form of action adopted in this case to recover in view of such a contract? The action is for a *quantum meruit* for the reasonable value of her services. It is true a party may sue on a *quantum meruit*, and the disclosure at the trial of a specific contract will not defeat his action. *Mansur v. Botts*, 80 Mo. 651. But the contract when developed on trial will control and limit the amount and character of the recovery. *Ib.*

Under the contract testified to by the plaintiff the compensation for the labor of herself and husband, was what they could raise together, or earn out of the farming business. It was not a contract for hire or wages. Would there not, therefore, have to be an accounting between the parties to ascertain what the result of the joint adventure was, beyond expenditures, before any judgment could be rendered against defendant? It is true that for about five



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months after the husband's death the plaintiff continued to work on the premises. But there is no evidence that this was under any other arrangement than the one under which she first went to defendant's home. The law presumes, in such case, that she remained under like terms of compensation, if any, for her services. So far as the \$50 sued for are concerned, there was no evidence that the money was the separate property of the wife. The right of action, if any, therefore, survived to the administrator of the husband. The evidence in this record shows that the plaintiff, especially, and her husband worked faithfully and well, and performed valuable services for the defendant, and it would be a hardship if the husband's estate should not be compensated. But redress must be sought through legal remedies.

It follows from the foregoing conclusions, that the instruction asked by defendant at the close of plaintiffs' evidence, in the nature of a demurrer to the evidence, should have been given.

The judgment of the circuit court is, therefore, reversed and the cause remanded. All concur.

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CRANE, *Appellant*, v. TIMBERLAKE.

1. **Replevin: FRAUDULENT SALE: POSSESSION.** Defendant, as sheriff, levied an attachment upon a number of sheep in favor of an execution creditor. Plaintiff claimed them by virtue of a bill of sale from the execution debtor, and brought an action of replevin against defendant for their possession. The consideration of the sale to plaintiff was an antecedent debt, and the sheep in question had never been separated from other sheep of the vendor, nor taken from the latter's possession; *Held*, that the sale was void as to the creditors of the vendor, and that plaintiff was not entitled to their possession. R. S. 1879, § 2505.
2. **Practice in Supreme Court: WEIGHT OF EVIDENCE.** The Supreme Court will not interfere with the authority of the trial court

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to weigh the evidence, and will not reverse a judgment for supposed errors in this respect.

*Appeal from Clay Circuit Court.*—HON. G. W. DUNN, Judge.

AFFIRMED.

*Samuel Hardwicke* for appellant.

The evidence is, that the sheep in question were separated from the other sheep of the vendor at the time of the sale, after which they were left with him. In the absence of any pretense of bad faith, and where full value is paid, this is a sufficient delivery. The court erred in holding appellant bound by the value of the sheep, as set out in his petition and affidavit. R. S. 1879, §§ 3857, 3860; *Howenthal v. Watson*, 28 Mo. 360; *White v. Van Houten*, 51 Mo. 577; *State ex rel. Johnson v. Dunn*, 60 Mo. 64. When the sheep were purchased by appellant, they were sound and well, and the price paid for them was \$20 apiece. When he replevied them, he supposed they were still sound and well, and put their value at the same amount. When he got them, he found they had the "scab," a contagious disease, which greatly impaired their value. There is no pretense that in their diseased condition they were worth more than \$10 apiece.

*Gates & Wallace* for respondent.

The pretended sale or mortgage of the property in controversy, by Archer to Crane, was void as against the creditors of said Archer, and consequently void as against the defendant, Timberlake, who held the sheep at the time they were replevied from him under attachment issued in a suit in favor of William A. Findley against Samuel Archer. The court was justified in finding that there had not been a delivery of the sheep in a reasonable time, regard being had to the situation of the property, and that this pretended sale had not been followed by an actual and continued

change of possession of the property sold. See Laws of 1877, p. 320; Gen. St., vol. 1, § 2505, p. 419; *Wright v. McCormick*, 67 Mo. 426; *Stern v. Henley*, 68 Mo. 262. The court did not err in the amount of its judgment. The value was a question of fact, which the circuit court passed on, and this court will not interfere, when it is fully supported, both by the pleadings and the evidence. *Schulenburg v. Boothe*, 65 Mo. 477. See, also, *Long v. Cockrell*, 55 Mo. 93; *Fallon v. Manning*, 35 Mo. 271; *Wooldridge v. Quinn*, 70 Mo. 370; *Selking v. Hebel*, 1 Mo. App. 454; *Schaffer v. Faldbush*, 16 Mo. 337; Wells on Replevin, § 569, p. 310, § 659, p. 359

MARTIN, C.—This was an action of replevin for twenty-eight rams, of the alleged value of \$560.

The defendant was in possession of them, as sheriff, in pursuance of an execution against one Samuel Archer. The plaintiff claimed them by virtue of a bill of sale from said execution debtor. The evidence showed that there had been no change of possession, but that they remained in Archer's possession, the same as before the sale, and that they were so commingled with his other sheep that the plaintiff replevied nine which were not included in his bill of sale. These nine were taken from him under process in favor of a mortgage of the execution debtor, and the defendant makes no claim for return of them, or for damages in lieu thereof. The only way in which the debtor could distinguish his own sheep from the sheep sold to plaintiff, was by his familiarity with "their countenances and looks."

The consideration of the sale was an antecedent debt, and it was so manifestly void as to creditors of the vendor, that no serious argument can be made in its support. R. S. 1879, § 2505. The plaintiff being in possession of the property replevied, the court, after finding against him, assessed the value of the nineteen rams at \$380, which sum the defendant elected to take in lieu of a return of the property.

The plaintiff, in his motion for a new trial, alleges that

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this assessment was above the actual value of the property, and against the weight of evidence.

The affidavit of plaintiff in the replevin proceeding, as well as the price of the bill of sale given in evidence, supports this assessment. The court did not rule that the plaintiff was concluded by the value stated in the affidavit. On the contrary, the plaintiff was permitted to produce and did produce other evidence tending to show that the sheep were not worth the amount there stated, and after hearing the other evidence, it rendered judgment at the value disclosed in the affidavit and sale bill. In doing this the court exercised its authority of weighing the evidence, and the appellate court will not reverse for supposed errors in this respect.

No instructions or declarations of law are to be found in the bill of exceptions; and no exceptions on the admission or exclusion of evidence. And as the judgment is supported by evidence, it will have to be affirmed, and it is so ordered. All concur.

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SCOVILLE V. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, *Appellant*

1. **Contributory Negligence, when a Question for the Jury.** When the facts in evidence as to contributory negligence admit of different constructions or inferences, the question of such contributory negligence is one for the jury.
2. **Negligence, where Deceased is Guilty of Contributory Negligence.** Where, in an action against a railroad for negligently causing the death of a person, it appears that the deceased was guilty of contributory negligence, the negligence of the defendant, to make the latter liable, must occur after it either knew, or might, by the exercise of ordinary care, have known of the danger of the deceased.

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*Appeal from Livingston Circuit Court.*—HON. J. M. DAVIS,  
Judge.

REVERSED.

*Geo. W. Easley* for appellant.

The evidence offered on behalf of the plaintiff, being undisputed that the approach of the engine and car could have been known by the deceased in time to have enabled him to step aside and avert the injury, the demurrer to the evidence should have been sustained. *Zimmerman v. Railroad Co.*, 71 Mo. 476; *Henze v. Railroad Co.*, 71 Mo. 636; *Railroad Co. v. Elliott*, 28 Ohio St. 340; 14 Am. R'y Rep. 123; *Allyn v. Railroad Co.*, 105 Mass. 77; *Railroad Co. v. Hart*, 87 Ill. 529; 19 Am. R'y Rep. 249; *Harlan v. Railway Co.*, 65 Mo. 22; 64 Mo. 480; *Railroad Co. v. Huston*, 95 U. S. 697; *Stillson v. Railroad Co.*, 67 Mo. 676; *Fletcher v. Railroad Co.*, 64 Mo. 484; Field on Damages, p. 164, § 173; *Blaker v. Railroad Co.*, 18 Am. L. R. (N. S.) 562; *Salter v. Railroad Co.*, 75 N. Y. 273; Week's Dam. Absq. Inj., p. 244, § 121; 1 Addison on Torts, (Wood's Ed.) p. 580, note 1; Pierce's Am. R. R. Law, 273; *Langan v. Railroad Co.*, 5 Mo. App. 311; Shearman & Redfield on Neg., §§ 488, 488 a; *Railroad Co. v. Buckner*, 28 Ill. 299; *O'Donnell v. Railway Co.*, 8 Cent. L. J. 414; *Purl v. Railroad Co.*, 72 Mo. 168; *Powell v. Railroad Co.*, 76 Mo. 80; *Lenix v. Railroad Co.*, 76 Mo. 86; *Turner v. Railroad Co.*, 74 Mo. 602. The second and fifth instructions given on behalf of the plaintiff, are clearly wrong and lack the modification required by the following cases, that the negligence to create liability on the part of defendant, must occur after becoming aware of the danger of the deceased. *Karle v. Railroad Co.*, 55 Mo. 476; *Isabell v. Railroad Co.*, 60 Mo. 475; *Maher v. Railroad Co.*, 64 Mo. 267; *Harlan v. Railroad Co.*, 64 Mo. 480; s. c., 65 Mo. 22; *Nelson v. Railroad Co.*, 68 Mo. 593; *Cagney v. Railroad Co.*, 69 Mo. 416; *Swigert v. Rail-*



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road Co., 75 Mo. 475; *Strauss v. Railroad Co.*, 75 Mo. 185; *Yarnell v. Railroad Co.*, 75 Mo. 576. For the reasons assigned in these cases the defendant's third instruction should have been given, because it was not negligence not to see him there. *Hallihan v. Railroad Co.*, 71 Mo. 113. The third and eighth instructions given on behalf of the plaintiff both predicate the plaintiff's right to recover, on the failure to ring the bell or sound the whistle, and this without requiring the jury to pass on the question of whether the deceased was on the crossing or not. This was error. *Zimmerman v. Railroad Co.*, 71 Mo. 476; *Bell v. Railroad Co.*, 71 Mo. 58. And ignores the fact alleged in plaintiff's petition, that deceased had voluntarily taken upon himself the duties of a servant, which relieved the defendant of the duty of sounding the whistle or ringing the bell. *Rohback v. Railroad Co.*, 43 Mo. 187. Not only were these instructions bad, but there was further error in refusing the fifth asked by defendant. The defendant's sixth instruction should have been given. It gave the jury some practical rule for determining whether the deceased directly contributed to his injury or not. *Schaabs v. Woodburn Wheel Co.*, 56 Mo. 173; *Powell v. Railroad Co.*, 76 Mo. 80; 1 Addison on Torts, (Wood's Ed.) p. 609, § 567; *Tuff v. Warman*, 5 C. B. (N. S.) 573. The ninth instruction asked by the defendant should have been given. Saunders on Neg., 143; *Degg v. Railroad Co.*, 1 Hurlst & Nor. 773; 40 Eng. L. and E. Rep. 376; *Osborne v. Railroad Co.*, 68 Me. 49; 28 Am. Reps. 16; 19 Am. R'y Rep. 7; *Potter v. Faulkner*, 1 Best & Smith 800; Woods M. and S., p. 907, § 455; Schouler's Dom. Relations, 644. So rigid is this rule, that the employer has been held liable for the negligence of such volunteer servant. *Althorf v. Wolfe*, 22 N. Y. 355. And that such volunteer was a minor works no change in the rule. *King v. Railroad Co.*, 9 Cush. 112; *Flower v. Railroad Co.*, 69 Pa. St. 210; *Sherman v. Railroad Co.*, 72 Mo. 62.

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*James W. Boyd* for respondent.

The demurrer to the evidence was properly overruled. Deceased was killed by the carelessness and negligence of defendant's servants. They exercised no care or caution. The engineer, who knew where he had started to, having no need of further signals, was at the time looking backwards, and excused this on the ground of looking for further signals. See *Kennayde v. Railroad Co.*, 45 Mo. 255; 43 Mo. 255; 50 Mo. 461; 52 Mo. 434; 60 Mo. 323, 475. When facts showing negligence admit of different constructions or inferences, the jury is the proper tribunal to pass thereon. 56 Mo. 351; 61 Mo. 588, and 37 Mo. 537. The instructions given for plaintiff were proper. *Brown v. Railroad Co.*, 50 Mo. 461; *Walsh v. Miss. Transfer Co.*, 52 Mo. 434; *Whalen v. Railroad Co.*, 60 Mo. 323; *Isabel v. Railroad Co.*, 60 Mo. 475; *Hicks v. Railroad Co.*, 64 Mo. 430. As to plaintiff's third instruction, see *Karle v. Railroad Co.*, 55 Mo. 476. Taken together, the instructions given present the law in the case very favorably and fairly to the defendant, and leave it no ground for complaint. The instructions asked by defendant and refused, were properly refused.

NORTON, J.—This suit was instituted in the circuit court of Clinton county by plaintiff to recover \$5,000 damages for the death of her minor son, alleged to have been killed by the negligence of defendant, in the management of one of its trains. The cause was transferred, by change of venue, to the Livingston county circuit court, where, upon a trial, plaintiff obtained judgment, from which defendant has appealed to this court. Omitting the portions of the petition not deemed to be material in the investigation of the questions involved in this appeal, it sets forth as the specific grounds for recovery the following:

That a short time thereafter, and at the time said Horace Scoville was killed, as aforesaid, he, said Horace

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Scoville, deceased, was at and near defendant's depot in said town of Easton, and was at, near and passing over a place where defendant's said railroad crosses a traveled public road and street in said town of Easton, and that defendant's said officers, agents, servants and employes at said time ran the defendant's said locomotive, engine and train of cars against, on and over the body of said Horace Scoville, deceased, and up to, on and over said public crossing in the night time, without ringing the bell on said engine at a distance of eighty rods from said public crossing, or at any distance whatever from said crossing, and without sounding the whistle on said engine at a distance of eighty rods from said public crossing, or at any distance whatever from said crossing, and without having any light or lantern on the front part of said train of cars, and without having and exercising any care or regard for the safety of any persons who might be at or near said crossing, or at or near defendant's said depot, and in such a way and manner as was in other and different respects from these above stated, careless, reckless, negligent and unskillful on the part of defendant's said officers, agents, servants and employes.

The answer, besides containing a specific denial of the allegations of the petition, averred that said Horace Scoville, at the time of his death, was unlawfully upon defendant's railroad track at a point where the same does not pass along or on a public road or street, and was unlawfully attempting to get upon defendant's car while the same was in motion, and that his death was caused by his own recklessness, negligence and unskillfulness, and not through, or by any default, negligence or unskillfulness of any of defendant's officers, agents, servants or employes.

After plaintiff's evidence was all put in, defendant asked the court to instruct the jury that under the evidence plaintiff could not recover. This instruction was refused and this action of the court is assigned for error.

The evidence tended to show that said Scoville, who was about eighteen years of age, was run over and killed

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about 8 o'clock at night, while he was on defendant's track, east of a street crossing at Easton, in Buchanan county, a station on defendant's road, while defendant was engaged in switching cars; that at the time he was run over, the engine in which the head light was burning was pushing in front of it a flat coal car upon which two youths were standing, towards the street crossing and that the bell was not rung nor whistle sounded, and that on the front end of the coal car there was neither light nor watchman. The evidence also tended to show that the noise made by the running of the engine and car could have been heard a hundred feet, and that an engineer could see on ahead of him with a good head-light from 150 to 200 feet, and that a train of cars going at the rate of six miles an hour, could be stopped from twenty to thirty-five feet. There was, also, evidence of several witnesses to the effect, that the head-light would have a tendency to dazzle the eyesight of a person on the track, and prevent him from seeing a flat car in front of the engine.

It was, also, in evidence that a person in the night, in front of an engine, cannot tell from the headlight whether it is going backward or forward, or standing still. Under this state of the evidence, the question, as to whether Scoville was guilty of such contributory negligence as would prevent a recovery, was for the jury under proper instructions, and the demurrer to the evidence was properly overruled, it having been held in the following cases that when the facts in proof admit of different constructions or inferences, that the question of contributory negligence is for the jury. *Norton v. Ittner*, 56 Mo. 351; *Smith v. Union R'y Co.*, 61 Mo. 588.

The defendant also assigns for error the action of the court in giving the following instructions:

Even if the jury should believe, from the evidence, that Horace Scoville, was when killed, unlawfully or wrongfully on defendant's track, the fact that he was wrongfully or unlawfully on its track, does not, in law, relieve defendant's

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employees or servants of their obligation to exercise due and reasonable care and caution in the management and running of defendant's cars, nor does it give them any right to run said cars over him; and notwithstanding the jury may believe from the evidence that Horace Scoville was unlawfully or, wrongfully on defendant's track when killed, still, if the jury believe from the evidence, that defendant's employees might, by the exercise of reasonable care and caution, have avoided killing him, the defendant is responsible, and the jury will find for plaintiff.

The court instructs the jury that should they even believe from the evidence that Horace Scoville, deceased, was guilty of negligence or carelessness which contributed to his death; yet if they further believe from the evidence, that the agents or employees of defendant in charge of defendant's engine or train of cars with which the injury was done, might, by the exercise of reasonable, ordinary care and caution have avoided killing deceased, then they will find for the plaintiff.

It is insisted that these instructions are erroneous in this, that they omit to tell the jury that the negligence to make defendant liable must have occurred after its servants either knew, or might, by the exercise of ordinary care, have known of the danger to the deceased. This point we think is well taken, it having been held in the case of *Isabel v. H. & St. J. R. R. Co.*, 60 Mo. 482, that "in order to make a defendant liable for an injury when the plaintiff has also been negligent, or in fault, it should appear that the proximate cause of the injury was the omission of defendant, after becoming aware of the danger to which the plaintiff was exposed, to use a proper degree of care to avoid injuring him." So in the case of *Harlan v. St. L., K. C. & N. R. R. Co.*, 65 Mo. 22, it is held that, "when it is said in cases where plaintiff has been guilty of contributory negligence, that the company is liable, if by the exercise of ordinary care it could have prevented the accident, it is to be understood that it will be so liable if, by the ex-



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ercise of reasonable care, after a discovery by defendant of the danger in which the injured party stood, the accident could have been prevented, or, if the company failed to discover the danger through the recklessness or carelessness of its employes when the exercise of ordinary care would have discovered the danger and averted the calamity." The doctrine announced in these cases has been reiterated in 64 Mo. 267, 480; 68 Mo. 593, and 69 Mo. 416.

For the error pointed out in the above instructions, the judgment will be reversed and cause remanded. It may be proper to remark that the third instruction asked and refused by the court when modified according to the rule laid down in the case of *Harlan v. St. L., K. C. & N. R. R. Co.*, *supra*, should be given.

All concur, except Judge Sherwood, absent.

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QUELL *et al.* v. HANLIN, *Appellant.*

**Land, when no Interest in, subject to Execution.** Where the equitable title to land with the right to its possession is acquired in the name of one person, but, in fact, belongs to and is held in trust for another, the former is not beneficially interested in the land, and has, therefore, no interest subject to levy and sale under execution against him.

*Appeal from Clinton Circuit Court.*—HON. G. W. DUNN, Judge.

AFFIRMED.

*B. J. Casteel and Ramey & Brown* for appellant.

Seiler had an equitable interest in the land in controversy, to which the lien of the judgment against him attached, and which was subject to levy and sale under execution. R. S. 1879, §§ 2354, 2356, 2730, 2336; also *Ib.*, §

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2767; *Levy v. Thompson*, 4 How. 17; *Anwerthe v. Mathiot*, 9 S. & R. 397; *Russell's Appeal*, 15 Pa. St. 319; *Cardiff v. Anderson*, 3 Binn. 4; *Brant v. Robertson*, 16 Mo. 130; *Lumley v. Robinson*, 26 Mo. 364; *Yeldell v. Barnes*, 15 Mo. 444; 1 Jones on Mort., § 740; *O'Neill v. Capelle*, 62 Mo. 202; *Johnson v. Huston*, 17 Mo. 58. The agreement between Livengood and Seiler makes the assignment simply a security for the money advanced. *Tibeau v. Tibeau*, 22 Mo. 77.

*Hiram Smith, Jr.*, and *Thos. E. Turney* for respondents.

(1) When one purchases land in his own name with the money of another, "the presumption at once arises that the benefits accruing from the purchase are to go to him who paid the consideration." *Kelly v. Johnson*, 28 Mo. 248; *Miller v. Davis*, 50 Mo. 572; *Darrier v. Darrier*, 58 Mo. 222, 226; "and parol evidence is admissible to show the intention of the parties," even when the taking of the title in the name of the nominal purchaser is authorized. *Darrier v. Darrier*, 58 Mo. 227, and cases cited. (2) Seiler had no interest in the land which was subject to levy and sale under execution. *Broadwell v. Yantis*, 10 Mo. 403; *Branch v. Robertson*, 16 Mo. 149; *McIlwaine v. Smith*, 42 Mo. 45; *Morgan v. Bouse*, 53 Mo. 219. (3) There is no misjoinder of parties plaintiff, but if there was the objection is waived. R. S., § 3519; *Kellogg v. Matin*, 62 Mo. 429.

MARTIN, C.—This was an action of ejectment in the usual form. The defendant in answer pleaded a general denial, along with a statement of facts constituting the title under which he claimed. It, also, included an offer or tender of \$230, for the purpose of discharging a lien of that amount in favor of the plaintiff, Quell, in the event a lien should be adjudged in his favor.

It is unnecessary to consider the motion for a judgment on the pleadings, which concluded with a replication

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of matters at length. The pleadings were sufficient to admit the evidence presented by the parties, and as the court rendered judgment for plaintiff upon the evidence and pleadings, it is only necessary for us to inquire whether the title of plaintiffs justified a recovery in an action of ejectment.

The Hannibal & St. Joseph Railroad Company is admitted by both sides as the common source of title. On the 12th of January, 1880, the company executed and delivered to one Lucius L. Seiler two written contracts, wherein it is recited that said Seiler had made the first of four payments for the parcels of land in controversy amounting to \$230, and that upon making the remaining three at specified times, the company would make conveyance of land to him. He was to have the immediate right of possession and cultivation until default in the deferred payments. By virtue of a judgment against Seiler of April 9th, 1878, an execution issued on the 19th day of January, 1880, under which levy was made on this land on the same day. The sale under this levy was made on the 12th of April, 1880, at which the defendant, Robert Hanlin, became the purchaser. If Seiler was the beneficial owner of this land as disclosed by the written contracts, at any time during the lien of the judgment under which the defendant purchased, and before enforcement of the lien by execution and sale, then the equitable estate with the right of immediate possession passed to the defendant. It appeared in evidence that the money paid by Seiler for the land belonged to one Leonard C. Livengood, who held toward him the attitude of a helping friend.

The evidence tends to show that with this money of Livengood's the land in controversy was to be purchased by Seiler, and the contract taken either in the name of Livengood or in the name of Seiler, and then assigned to Livengood. The land was thus purchased by Livengood's money, and the contract of purchase was assigned to Livengood by Seiler, by assignment of the same date with the date of pur-

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chase, but which was not acknowledged until the 17th of February, 1880. On the 20th of March, 1880, Livengood assigned the contract to Mr. Quell, the plaintiff, who, on the 23rd of March, 1880, instituted this action. This evidence, which was clearly competent, tended to prove that Seiler never was beneficially seized of the land, but that the equitable title with right of possession, acquired in his name, belonged in truth to Livengood, who, before suit, assigned it to plaintiff, Quell. Under this state of facts the purchaser under execution against Seiler, would acquire nothing, for the reason that he was seized of nothing in his own right, and that the title appearing in his own name was held by him in trust for another.

The defendant insists that from sundry expressions of witnesses in their testimony, there was an understanding or arrangement between Livengood and Seiler by which Seiler was ultimately to have the land, upon repaying Livengood his advance of \$230, and any other advances he might make upon it, and that under this arrangement the contract for title and possession, claimed by Livengood, was held only as security for his advances, and that Seiler, or his execution assignee, would be entitled to the contract and right of possession, subject only to a lien for said advances, which the answer offered to pay off and discharge.

This view of the evidence did not prevail with the court trying the case, and I perceive no good reason for disturbing its judgment upon it. I am inclined to believe from the evidence, that Livengood, as a friend deeply interested in the welfare of Seiler, entertained an intention of helping him at some future time to the ownership of the land. But at the time of the levy or lien, this intention remained entirely voluntary and executory in the mind of Livengood, and Seiler had nothing definite to show for it, and had done nothing to make it obligatory on Livengood to carry out his intention. Seiler had never paid anything on account of the land, neither had he ever been in possession of it, or made any improvements upon it, which would

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render it inequitable in Livengood to change his intention and retain the title to himself, or convey it to another as he has done. Neither was Seiler under any obligations to pay anything to Livengood. He had never promised or made tender of anything for the land. "If no money has been paid, and if the person who may become the purchaser is not actually under any obligation to pay, then there is no seizin in the seller, even in equity, to the purchaser's use, and there is no interest in the land in him, which is liable on execution." *Brant v. Robertson*, 16 Mo. 149, Gamble, J.

I do not think Seiler was possessed of any estate in the land subject to execution. In accordance with these views the judgment should be affirmed. The Hannibal & St. Joseph Railroad Company may have been an unnecessary party to the suit when it was commenced, having parted with the right of possession until default under the contract of purchase. Since suit, the right of possession may possibly have passed from Quell to the company by reason of such default, and we will not undertake to say in which one it now resides. As the objection to the misjoinder was not taken or urged in the lower court at any stage of the proceedings, we do not think it necessary to order the name of the company stricken from the record. The company, in any view of the case, holds the legal title in trust for Quell, the co-plaintiff, in accordance with the terms of the contract held by him. Affirmance is ordered. All concur.

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ARMSTRONG, *Administrator*, v. ROBARDS, *Plaintiff in Error*.

**Deed of Trust, Release of:** WHEN SET ASIDE IN EQUITY. Equity will set aside a release of a deed of trust as against the heir of the grantor, where it appears such release was made by the trustee without the knowledge or consent of the *cestui que trust*, and without the debt secured by the deed of trust having been paid.



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*Error to St. Louis Court of Appeals.***AFFIRMED.***James Carr* for plaintiff in error.

When A. S. Robards, the defendant in the judgments, died, the lien therefor could not be enforced by execution; they could only be enforced in the manner provided for in the administration law. Wag. Stat., p. 101, § 1; *Prewitt v. Jewell*, 9 Mo. 733; *In re Bank*, 5 Bissell; *Ewing v. Taylor*, 70 Mo. 398. If John C. Hatch had a right to redeem, then John S. Robards, as his assignee, had a right to redeem. Jones on Railroad Securities, § 442; Hilliard on Mortg., 396, 397; 4 Kent side p. 185; Story's Eq., § 1023; *Brainard v. Cooper*, 10 N. Y. 356; *Hitt v. Holliday*, 2 Littel 332; *Stainback v. Geddy*, 1 Dev. & Bat. Eq. 479; *Gray v. Shaw*, 14 Mo. 346; *Merry v. Fremon*, 44 Mo. 518; *Alnutt v. Leper*, 48 Mo. 319; Wag. Stat., p. 790, §§ 2, 3; Jones Mortg., § 1069; *Martin v. Michael*, 23 Mo. 50. A lien is not necessary to entitle a judgment creditor to redeem. *Merry v. Fremon*, 44 Mo. 518; *Alnutt v. Leper*, 48 Mo. 319; *Trent v. Trent*, 24 Mo. 307. The effect of not making a judgment creditor a party to a suit to foreclose a mortgage, is to leave the right to redeem on his part open. *Valentine v. Havener*, 20 Mo. 133; Wag. Stat., p. 955, § 11; Jones on Railroad Securities, § 442; *Olmstead v. Tarsney*, 69 Mo. 396. There is no consideration for the second note and deed of trust, except the release of the first note and deed of trust. When Grove accepted the second note and deed of trust he thereby released the first, and should have surrendered the first note to Archibald S. Robards, the maker, according to the contract between them. When James Thompson, as trustee in the first deed of trust, released it, he thereby divested himself of the legal title, and after that he had no more title to sell under the first deed of trust than any other person who had no title. In other words,

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as Thompson himself had no title at the time of the pretended sale, he could impart none to Grove. *Gott v. Powell*, 41 Mo. 416; *Rutherford v. Williams*, 42 Mo. 18; *Brown v. Railroad Co.*, 43 Mo. 294. Laches cannot be objected to as a bar to the plaintiff in error; he is a judgment creditor with all the advantages thereof over a creditor at large. *Spurlock v. Sproule*, 72 Mo. 503; *Kelly v. Hurt*, 61 Mo. 463; *Ewing v. Taylor*, 70 Mo. 398; *Martin v. Michael*, 23 Mo. 50. The plaintiff in error is also an heir. He has a right as such to redeem. *Mann v. Best*, 62 Mo. 491.

*George P. Strong* for defendant in error.

Under the provisions of the constitution of Missouri, article 6, section 12, the judgment of the court of appeals was final, and this court has no jurisdiction of the cause; the petition is filed to set aside a release of a deed of trust given to secure a debt of \$1,120. It does not involve title to land, and does not involve \$2,500. The party receiving satisfaction of the debt, secured by a deed of trust, is the only party (except the creditor) authorized by the statute to enter satisfaction or release the deed of trust. The trustee has no power to release it, unless the satisfaction has been received by him, and any release made by him is a nullity. R. S. 1855, p. 1091, § 21; R. S. 1879, p. 565, § 3311; *Grove v. Heirs of Robards*, 36 Mo. 523; *Grove's Admr. v. Robards*, 9 Mo. App. 179; *Ewing v. Shelton*, 34 Mo. 518. A court of equity will not enforce a verbal release or discharge of a mortgage or deed of trust, unless such verbal release or discharge is proved by the clearest and most satisfactory evidence. No such evidence was furnished in this case. *Stevenson v. Adams*, 50 Mo. 475, 476; *Lippold v. Held*, 58 Mo. 213. A court of equity will not interpose to restore rights lost by laches, nor grant equitable relief where the party has an adequate remedy at law, or where such a remedy has been lost by negligence or delay. The judgments under which John L. Robards claims, were a lien upon this property before the second deed of trust

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was made, and some of them were a lien when the first deed of trust was given, and a sale under them would have conveyed a good title. These judgment creditors neglected to sell and thereby lost their lien. *Stevenson v. Saline Co.*, 65 Mo. 430, and cases therein cited by the court; *Strong v. Hopkins*, 1 Mo. 530, top p. 376; *January v. Spedden*, 38 Mo. 402; *Blanchard v. Williamson*, 70 Ill. 647; *Le Moyne v. Quinby*, 70 Ill. 399; *McQuiddy v. Ware*, 20 Wall. (U. S. S. C.) 14. John L. Robards has no such interest in these lands as entitles him to come into a court of equity and ask that he may redeem them, or that any cloud upon the title may be removed. He has no title to them, nor has he any lien upon them. All that he claims is, that he is a creditor by virtue of his securing an assignment of certain worthless judgments, long after the lien was lost, and long after this suit was brought. See cases cited; 20 Ill. 403, and 20 Wall. (Sup. Ct.) 19; *Hiney v. Thomas*, 36 Mo. 378, 379.

EWING, C.—Archibald S. Robards and his wife owed Jacob E. Grove \$1,120, evidenced by note; to secure the same they made a deed to Jas. Thompson, as trustee, July 21st, 1860. April 30th, 1861, the trustee, Thompson, released the deed to A. S. Robards. To set aside this release Jacob E. Grove in September 1864, filed his bill in the Hannibal court of common pleas, alleging substantially that Archibald S., and John L. Robards fraudulently represented to Thompson, the trustee, that the debt had been paid off, and thereby induced him to execute a release and place it on record, which was done April 30th, 1861. That the deed of trust so released, was on lot 7, in block 40, in Hannibal. That Robards paid about \$200 on the note and the balance was still due. That Robards died. That afterward, at the request of plaintiff, the trustee, Thompson, advertised under the deed, and at the sale the plaintiff, Grove, became the purchaser for \$900 and received a deed from the trustee. This suit was against A. S. Robards, ad-

ministrator, his widow, and his heirs at law. That the widow had commenced proceedings to have dower assigned and plaintiff prays that she be restrained from proceeding further in the matter, and that the fraudulent release be set aside and cancelled.

This bill was dismissed, the case appealed to this court, (*Grove v. Heirs of Robards*, 36 Mo. 523) the judgment below reversed and the venue was then changed to the circuit court of St. Louis. Meanwhile the plaintiff, the widow of Robards, the original administrator of the plaintiff and the trustee had all died; the suit abated as to the widow and trustee, and when the case came on for hearing in November, 1877, there was default as to all the other defendants except John L. Robards, one of the sons of Archibald Robards, deceased, whose answer alleged that when the deed of release was made, the note for \$1,120 had been paid off by a new note made by Robards to Grove for \$1,250, in lieu of the old one, dated March, 1861, which was secured by a deed of trust on other property with H. H. Wardlow as trustee, which was accepted by Grove in payment of the first, and that the first deed of trust was satisfied and released by Thompson, the trustee, at Grove's request. That thereupon Grove refused to relinquish the old note; that Grove fraudulently induced Thompson, the trustee, to sell under the first deed when he knew the debt was paid off. That he fraudulently persuaded Wardlow, the trustee in the second deed, to sell and became the purchaser thereunder October 12th, 1863, for \$425. That Grove, during his lifetime, and his executor after his death, had collected rents from the premises in the second deed of trust, and which were more than sufficient to pay the balance of said note. That A. S. Robards died insolvent, and died leaving various judgments against his estate amounting to nearly \$7,000. That these were proved up against his estate in the probate court, and in 1867 assigned to defendant for value; that the sale to Grove was fraudulent; that the deed of release of Thompson was a cloud on the title which

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enabled Grove to buy at a sacrifice; that he, defendant, is a judgment creditor, and as such is entitled to redeem and offered to pay off said debt to Grove in his lifetime and take the property; and has offered the same to his executor since Grove's death. He then prays that the first deed of trust be declared satisfied and the first note surrendered; that an account be taken of rents received by Grove and his executor, and that defendant be permitted to redeem. The new matter in the answer was denied in the replication. The bill on the hearing was taken as confessed as to all the defendants but John L. Robards. The suit having abated as to the trustee, Thompson, and the widow, the circuit court found that the release by Thompson was made without Grove's knowledge or consent; that no part of the debt was ever paid to Thompson, nor was the debt paid at all, at the date of the foreclosure; and that the defendant John L. Robards had no right to redeem. The deed of release made by Thompson was annulled and judgment for costs for plaintiff. The case was then taken to the St. Louis court of appeals where the judgment of the circuit court was affirmed, and the case comes here for review.

After a careful examination of the facts and the law, and the opinion of the court of appeals, we fully concur in the conclusions arrived at in that opinion, and deem it wholly unnecessary to pursue the case further. We therefore affirm the judgment of the court of appeals. All concur.

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THE STATE V. CAVE, *Plaintiff in Error.*

**Pleading Criminal:** INDICTMENT FOR PERJURY. An indictment for perjury which names the cause in which the alleged perjury was committed, and the court in which the same was being tried, states the materiality of the issue so that the court can determine it, sets out the facts alleged to have been sworn to, negatives their truth and properly assigns perjury upon them, is sufficient.



*Appeal from Bates Circuit Court.*—HON. J. B. GANTT,  
Judge.

AFFIRMED.

*A. Henry* for appellant.

In a somewhat similar case to this, it was held that the indictment was not sufficient. *State v. Holden*, 48 Mo. 94; *State v. Keel*, 54 Mo. 184; *State v. Hamilton*, 65 Mo. 669. The indictment only alleges in the language of the pleader the substance and effect of defendant's testimony. Defendant's language, in whole or in part, should have been set out, so that the court might determine its effect.

*D. H. McIntyre*, Attorney General, for the State.

The only point which can be raised upon the record is the sufficiency of the indictment. The indictment is sufficient. It names the cause in which the alleged perjury was committed, the court in which it was being tried, the taking of the oath by the defendant, and the authority of the officer who administered it; it alleges that certain matters became material to such inquiry, and sets them out, sets out the facts to which defendant testified upon such trial, and properly assigns perjury upon them. *State v. Holden*, 48 Mo. 93; *State v. Keel*, 54 Mo. 182; *State v. Wakefield*, 9 Mo. App. 326, and 73 Mo. 549; R. S. 1879, § 1424.

NORTON, J.—Defendant was indicted, in the Bates county circuit court, for perjury, and on trial was convicted and his punishment assessed at seven years' imprisonment in the penitentiary, and the cause is brought to this court by writ of error, and the only question presented is, whether the indictment is sufficient in law.

The indictment charges that, in the Bates county circuit court, one Isaac McKinzie was, in due form of law,

tried upon a certain indictment then and there depending against him, the said Isaac McKinzie, and of which the court had jurisdiction, for having on or about the 2nd day of January, 1879, at the city of Butler, in the county of Bates and State of Missouri, willfully, maliciously and feloniously set fire to and burned a certain house then and there being the property of one John A. Devinny, on which said indictment the said Isaac McKinzie then and there pleaded not guilty, and the said issue was then and there to be tried by a jury of the county in that behalf duly sworn, and at the said trial, so then and there had as aforesaid, one George Cave then and there appeared as a witness for and on behalf of the State of Missouri, plaintiff in said action aforesaid, and was then and there duly sworn and took his oath before said court, which said oath was duly administered to the said George Cave by Hon. Jas. B. Gantt, who was then and there judge of said court, having full power and competent authority to administer the said oath to the said George Cave in that behalf, that the evidence he should give to the court there and the jury so sworn as aforesaid, touching the matter then there in question, should be the truth, the whole truth and nothing but the truth.

And at and upon the trial of the said cause aforesaid, it then and there became and was a material question whether the said Isaac McKinzie and one John Bybee had on or about the 2nd day of January, A. D., 1879, at the county of Bates and State aforesaid, willfully, maliciously and feloniously set fire to and burned a certain house building belonging to one John A. Devinny, and situated on the north side of the public square in the town of Butler, in said county of Bates, and the said George Cave then and there, upon his oath aforesaid, feloniously, willfully, corruptly and falsely, before the court and jury aforesaid, did depose and swear in substance and to the effect following: That is to say, that he, the said George Cave, on the first day of January, A. D., 1879, started from Henry

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county, Missouri, where he then lived, at four o'clock in the afternoon of that day and arrived in the town of Butler aforesaid at one o'clock in the morning of the 2nd day of January, A. D., 1879, and immediately went to a saloon on the northeast corner of the public square in said town of Butler aforesaid, which said saloon was then and there kept by Wainscot and Bailes, where he saw Isaac McKinzie and one John C. Bybee in said saloon kept by Wainscot and Bailes as aforesaid. That while in said saloon aforesaid he, the said George Cave, heard the said John C. Bybee ask the said Isaac McKinzie if he, the said Isaac McKinzie, were going to do that work for him, the said John C. Bybee, and that he, the said George Cave, saw the said John C. Bybee give to the said Isaac McKinzie two ten dollar bills telling him, the said Isaac McKinzie, to go and do that work for him, the said John Bybee; that he, the said George Cave, immediately thereafter went out of said saloon aforesaid and was immediately followed by the said John C. Bybee and Isaac McKinzie aforesaid, and that he then and there heard the said John C. Bybee tell the said Isaac McKinzie as they came out of said saloon to give Devinny a good scorching; that immediately thereafter he, the said George Cave, saw the said Isaac McKinzie walk across the street and go to a furniture store then and there kept by H. V. Pentzer and pick up some shavings that were lying in front of the furniture store and saw him, the said Isaac McKinzie, go in a southwesterly direction from said furniture store toward the rear end of the building belonging to the said John A. Devinny, being the building which he, the said Isaac McKinzie and John C. Bybee were charged with having burned in the said indictment then pending as aforesaid, and then and there saw the said Isaac McKinzie strike a match and ignite the shavings aforesaid and disappear behind certain buildings immediately east of the said building owned by the said John A. Devinny, and between the said Devinny building and him, the said George Cave; that the said John C. Bybee aforesaid was then and there

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present and saw what was being done by the said Isaac McKinzie; that he, the said Geo. Cave, immediately thereafter got on his mare and rode east and turned south until he came to what was then the Johnstown road, and then went east beyond the residence of Wm. Ross, then turned south and went to the residence of one Jacob Straton, colored, and staid the remainder of the night; that in the morning he, the said George Cave, rode up into Butler aforesaid and saw where the building aforesaid and other buildings adjacent thereto had been burned the night previous, and then immediately thereafter left the said town of Butler and returned to his home in Henry county, Missouri, aforesaid.

The indictment, after negating the truth of said testimony by proper averment, charges that the defendant did then and there, in manner and form aforesaid, unlawfully, willfully, corruptly and feloniously commit willful and corrupt perjury.

The indictment in question is not subject to the objection made to those in the cases of *State v. Holden*, 48 Mo. 93, and *State v. Keel*, 54 Mo. 182, where the indictments were held bad because it did not appear from them that the evidence given on the trial related to any material issue in the cause being tried. But, in the present case, the materiality of the issue being tried, and to which the evidence of defendant related, appears clearly upon the face of the indictment. The indictment alleges that the issue on trial was, whether one McKinzie was, or not, guilty of the crime of arson in burning a house in the city of Butler, Bates county, the property of one Devinny; it names the cause, the court in which the trial was had, the materiality of the issue is so stated that the court could determine as to its materiality, sets out with great particularity the facts to which defendant testified, bearing directly upon the issue, negatives the truth of the facts sworn to, and properly assigns perjury upon them. This, under the authority of the cases above cited, is sufficient.

The objection that McKinzie was on trial for setting

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fire to and burning a house in the city of Butler, and the evidence of defendant related to the burning of a house on the north side of the public square in the town of Butler, is too technical to merit serious consideration.

Judgment affirmed, in which all concur.

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SMITH, *Administrator, Plaintiff in Error*, v. STEEL.

**Judgment, nunc pro tunc.** A record entry of a verdict found, together with an order for entry of judgment, is not a judgment, and where, in an action here on a judgment rendered in another state, such record entry is offered in evidence together with a formal judgment for plaintiff, entered of record eleven years thereafter, such judgment will be regarded as one *nunc pro tunc* of the date of the verdict and so held, although there was a stipulation of record of the date of the verdict authorizing the plaintiff to take judgment without further notice.

*Error to Cooper Circuit Court.*—HON. E. L. EDWARDS, Judge.

AFFIRMED.

*John Cosgrove* for plaintiff in error.

The record entry of the New York court of March 24th, 1863, was not a *nunc pro tunc* judgment, but an independent judgment. *Walters v. Sykes*, 22 Wend. 566; *Townsend v. Wesson*, 4 Duer 342; 9 Barb. 504; 65 Mo. 618. The questions decisive of this case were decided when this case was here before, and should not be re-opened. *Overall v. Ellis*, 38 Mo. 209; *Boone v. Shackleford*, 66 Mo. 497; *Chambers v. Smith*, 30 Mo. 156.

*Draffen & Williams* for defendant in error.

(1) The record of the New York judgment is to have the same effect here, as in the state where rendered. No



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other, or different, effect is to be given to it. If, under the rules of practice and laws of New York, the date, when the order for judgment was entered, is treated, as the date of its rendition, it should be construed in the same way by our courts. Freeman on Judg., § 575. (2) The "rendition" of the judgment, according to the New York authorities, read in evidence, was when the court entered the order for judgment according to the verdict at the September term, 1852. See *Field v. Young*, 11 Wend. 522; *Lee v. Tiltson*, 4 Hill 27, read in evidence. See, also, *Genella v. Relyea*, 32 Cal. 159. The same question was presented in *California, etc., Co. v. Patterson*, 1 Nev. 124; *Kehoe v. Blethen*, 10 Nev. 445; Freeman on Judg., (3 Ed.) § 40; *Howell v. Moreland*, 78 Ill. 162. (3) The opinions, delivered by the courts of New York, were competent evidence to show, that under their rules of practice the date of the "rendition of the judgment" was when the court announced its finding and entered on its minutes an order for judgment. Rorer on Inter-State Law, p. 121; *Greason v. Davis*, 9 Ia. 219; *Taylor v. Runyat*, 9 Ia. 522. (4) The plaintiff had all the benefits of a judgment from September, 1852. See Freeman on Judg., (3 Ed.) §§ 47, 50, 51. Surely, he could not extend the life of the judgment eleven years, by simply waiting that length of time to have a more formal entry made. The fact that he asked the court to make another entry in the matter, could not vitiate the first entry or make it any the less the "rendition" of the judgment.

HENRY, J.—This suit was instituted in the circuit court of Cooper county, January 6th, 1875, upon a transcript of a judgment rendered in the supreme court of Cattaraugus county, state of New York, in favor of plaintiff's intestate against the defendant. Defendant's pleas were, *nul tiel* record, that he did not appear to the action in said supreme court, or authorize any one to appear for him, nor was served with process, and the statute of limitations.

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On the fourth Monday in September, 1852, the following entries were made in said original cause:

"Lorenzo Barlow against Daniel C. Steele and Geo. W. Robinson. On motion of R. Owen, Jr., of counsel for plaintiff, ordered: That a jury be empanelled in this cause, that the same proceed to trial. The jury, without leaving their seats, under the directions of the court, says, they find for the plaintiff, against the defendant, Daniel C. Steel, for \$452.73, and that they find for defendant. On motion of R. Owen, Jr., order judgment accordingly.

"Lorenzo Barlow against Daniel C. Steele. Stipulated that the plaintiff may take judgment upon the verdict in this action, without further notice. J. E. Weeden, defendant's attorney."

No other steps appear to have been taken in the cause until March 24th, 1863, when the following judgment was entered therein:

"SUPREME COURT.

LORENZO BARLOW,  
against  
DANIEL C. STEEL and  
GEORGE W. ROBINSON.

} Judgment signed March 24th, 1863.

This cause having been reached in its order on the calendar at the term of this court held at the court house in Ellicottville, Cattaraugus county, commencing on the fourth Monday of September, 1852, and the issues of fact therein having been tried by a jury, and the jury having found a verdict for the plaintiff against the defendant, Daniel C. Steel, for the sum of \$452.73, and on reading and filing stipulation of defendant's attorney, on motion of Henderson & Wentworth, plaintiff's attorneys, it is adjudged by the court that the plaintiff, Lorenzo Barlow, recover of the defendant, Daniel C. Steel, the sum of \$452.73, the amount of said verdict, together with interest thereon from the time of the rendering of said verdict to this date, being the sum of \$332.75; amounting in the whole to the sum of \$785.48.

THOMAS A. E. LYMAN, Clerk, (Seal)."

At the trial of the suit in the circuit court of Cooper county the defendant had a judgment which is now here on writ of error for review.

If the judgment entered in 1863 is but a *nunc pro tunc* judgment, this suit is barred by the statute of limitations. The cause was here once on defendant's appeal, and, at the October term, 1877, the judgment in plaintiff's favor was reversed. 65 Mo. 612. On this point, the court then held that the judgment of 1863, was an original, and not a *nunc pro tunc* judgment, but the judgment was reversed on the ground that the record from New York was not properly authenticated. The question, therefore, as to the character of the judgment of 1863, is still an open one. *Hamilton v. Marks*, 63 Mo. 167. The record entry made in September, 1852, was not a judgment. It was the record of a verdict found, and contained an order for the entry of a judgment then rendered. The view, that it was not the record of a judgment, is confirmed by the stipulation following that entry, that plaintiff might take judgment without further notice. "The entry should appear to have been intended as the entry of judgment, and not a mere memorandum by which it was to be constructed." Freeman on Judgt., § 52.

Eleven years after that record was made, plaintiff appeared in said court, and, on his motion the court entered a judgment reciting the steps taken in the cause in 1852. It is not declared on its face that it is a *nunc pro tunc* judgment, but all the recitals show that it was, unless the stipulation above noticed, gave plaintiff an indefinite time within which to have the judgment on the verdict entered. If he could exercise that right eleven years after the stipulation made, we see no reason why he may not have waited twenty or fifty years. No case is cited from the adjudications of the courts of New York, with respect to the effect of such stipulations, nor is any statute of that state in evidence which authorizes, or declares the effect of such agreements, or regulates the practice under them. We have no such practice in this State, and are left to grope in the dark with

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regard to the practice in New York and the construction of the stipulation. We incline to the opinion, that the plaintiff, without any application to the court, had the right, within the time that the judgment might have been entered under the stipulation, to have the clerk enter the judgment; and from the fact that this was not the course pursued, but plaintiff appeared in court and, on his motion, procured the entry of the judgment of 1863, our inference is, that it was not entered under or by virtue of the stipulation, but as a *nunc pro tunc* judgment, the time having elapsed within which it could have been entered under the stipulation.

Being, in substance, a *nunc pro tunc* judgment, it had relation back to the date of the original entry, which, although not a formal judgment, was evidence of a verbal judgment having been rendered, of which no formal entry had been made. This cause would present no difficulty if the stipulation was out of it, but, in the absence of a statute of the state of New York, and decisions of her courts showing the practice there with respect to such stipulations, we cannot give it the effect of authorizing the entry of a judgment after the verdict found, without regard to the lapse of time. Holding that the entry of 1863 was a *nunc pro tunc* judgment, the cause of action was, at the institution of this suit barred by the statute of limitations, and the judgment is affirmed. All concur, except SHERWOOD, J., absent.

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ROBIDOUX *et al.*, Appellants, v. CASSELEGGI *et al.*

1. **Admissions.** Admissions in an agreed statement of facts, to have that effect, should be expressed in terms and not by indirection.
2. **Deeds, Construction of: POSSESSION.** The ruling of this court in *Sutton v. Casseleggi*, 77 Mo. 397, as to the legal effect of certain deeds and possession thereunder, followed and held decisive of questions raised on this appeal.
3. **Ejectment: RENTS AND PROFITS, WHEN RECOVERABLE FOR PERIOD**

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PREVIOUS TO SUIT. Under Revised Statutes of 1879, section 2252, the right of the plaintiff in ejectment to recover the rents and profits of the premises for any period previous to the commencement of the suit, is predicated on the fact that the defendants had knowledge of the plaintiff's title, and it is only when such knowledge is brought home to the defendant that such recovery can be had.

4. **Evidence, Exclusion of:** ACTION OF TRIAL COURT, WHEN PRESUMED TO BE RIGHT. When documentary evidence, complained of as being improperly excluded by the trial court, does not appear in the bill of exceptions, the action of the trial court in excluding it will be presumed to be right.

*Appeal from St. Louis Court of Appeals.*

**AFFIRMED.**

*Alex. J. P. Garesche* for appellants.

Lange Allard takes nothing by the deed. 2 Snead (Tenn.) 404; *Butler v. Rutledge*, 2 Cold. (Tenn.) 4; *Allen v. Allen*, 47 Mich. 74. On a deed to husband and wife, they take per entirety, and the survivor takes the whole. Washburn Real Prop., (4 Ed.) vol. 1, p. 672, § 425; *Rogers v. Grider*, Dana (Ky.) 242; *Taul v. Campbell*, 7 Yerg. 319; *Ketchum v. Walworth*, 5 Wis. 95; *Gibson v. Zimmerman*, 12 Mo. 388; *Hall v. Stephens*, 66 Mo. —. Married woman is not estopped by the recitals of her deed. Bishop Mar. Women, vol. 2, § 489; *Dougal v. Fryer*, 3 Mo. 31. As to ouster by one tenant in common against another, that is a question of fact, not of law. *Lannan v. Huey*, 13 B. Mon. 443; *Lefavour v. Homan*, 3 Allen (Mass.) 355; *Steel v. Johnson*, 4 Allen (Mass.) 425; *Purcell v. Wilson*, 4 Gratt. 22; *Johnson v. Toulman*, 18 Ala. 50; *Block v. Lindsey*, Busbee Law (N. C.) 467; *Hubbard v. Wood*, 1 Snead (Tenn.) 286; *Keyser v. Evans*, 30 Pa. St. 507; *Hilton v. Duncan*, 1 Cold. (Tenn.) 316.

*Cline, Jamison & Day* for respondents.

- (1) Lange Allard and Rosalie Vermet *alias* Robidoux



not being husband and wife, the deed from Joseph Montague and wife of June 8th, 1818, to them, vested the title in them as tenants in common. *Gibson v. Zimmerman*, 12 Mo. 385; *Jackson v. Stevens*, 16 Johns. 110; *Doe v. Parrat*, 5 Term Rep. 652; 2 Black. Com., 182; 4 Kent Com., 363. (2) The deed from Lange Allard dated June 9th, 1821, to H. Cozens in trust for said Rosalie during her life, etc., with remainder to Laurent and Archange Robidoux disposed of one-half of said premises, the fee simple of which is now vested in Pauline Dalton. (3) Rosalie only had a life estate in said premises. *Price v. Hart*, 29 Mo. 171; *Boatman v. Curry*, 25 Mo. 433; *Thomas v. Pullis*, 56 Mo. 219; *Hall v. Betty*, 4 Wan. & G. 410. (4) Laurent Robidoux and Archange McDowell were privies to the said marriage contract, and could claim under it by virtue of the recitals in said contract; and the legal representatives of said Rosalie are estopped from claiming anything more than a life estate in the premises. *Clamorgan v. Greene*, 32 Mo. 285; *Joeckel v. Easton*, 11 Mo. 118; *Dickson v. Anderson*, 9 Mo. 156; *Carver v. Jackson*, 4 Pet. 82; *Bensley v. Burdon*, 8 Law Jour. Ch. 85. (5) Plaintiffs are barred by the statute of limitations. *Warfield v. Lindell*, 30 Mo. 273; *Hamilton v. Boggess*, 63 Mo. 249. (6) The possession of the defendants, and those under whom they claim, was open, notorious, adverse and hostile from the time of the entry of Laurent and Archange, under the compromise of the suit with the executors of Jesse Little in the spring of 1861, after the rendition of the judgment in said ejectment suit. (7) The deeds read in evidence by the defendants, were proper, although some of them were defectively acknowledged. They were admissible to show the character of the possession of said Rosalie, as well as a ratification by other deeds duly acknowledged. *Hamilton v. Boggess*, 63 Mo. 233; *Musick v. Barney*, 49 Mo. 458. (8) The instructions asked by plaintiff were properly refused by the court. *Musick v. Barney*, 49 Mo. 463; *Hamilton v. Boggess*, 63 Mo. 233; *Clark v. Life Ins. Co.*, 52 Mo. 272; *Codman v. Winslow*,

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10 Mass. side p. 151; *Comm. v. Dudley*, 10 Mass. side p. 408. The declarations of a person in possession of lands are competent evidence against himself, and all persons claiming under him, for the purpose of showing the character of his possession and by what title he claims. *Pitts v. Wilder*, 1 N. Y. 525; *Abeel v. Van Gelder*, 36 N. Y. 513; *Jackson v. Bard*, 4 Johns. 230; *Rogers v. Moore*, 10 Conn. 13. (9) The defendants showing an adverse possession for twelve or fifteen years, the plaintiffs must show that they are saved by the disabilities enumerated in the statute. *Gregg v. Jesson*, 1 Black (U. S.) 150; *Dessaunier v. Murphy*, 33 Mo. 184; Ang. Lim., (5 Ed.) §§ 477, 481; *Smith v. Burtis*, 9 J. R. 174; *Demorest v. Wynhoop*, 3 J. C. R. 129. Three years have not elapsed since the disability of infancy attaching to David P. expired; and he, had he sued alone, might, if proposition three be not sustained, recover one-eighth of one-third of one-half (or 1-48) part of the lot involved. But, suing with those who are barred, he cannot recover unless all the plaintiffs are dismissed or nonsuited except himself. *Walker v. Bacon*, 32 Mo. 144; *Kecton v. Kecton*, 20 Mo. 544. As to the three years' right to sue, see Ang. Lim., (5 Ed.) § 481; 9 J. R. 174; 3 J. C. R. 129; *Primm v. Walker*, 38 Mo. 94; *Billers v. Walsh*, 46 Mo. 492.

NORTON, J.—This is a suit by ejectment to recover the possession of a certain lot in the city of St. Louis described in the petition: The plaintiffs obtained judgment in the circuit court for the possession of one-sixth of the premises, which on appeal to the St. Louis court of appeals was affirmed, and from which the plaintiffs have appealed to this court.

It appears from the record before us that on the 18th of June, 1818, one Montague, who was the common source of title, conveyed by his deed the lot in question to Rosalie Vermet and Lange Allard, as her husband; that the said Rosalie at the time said deed was executed, was the lawful wife of John B. Roubidoux, her relation with Allard being

only a *liaison*; that she had two children of her marriage with Roubidoux, viz: Laurent and Archange; that in 1819, said Rosalie's husband rejoined her in St. Louis, where he lived with her until he died in 1826; that said Allard went to the Rocky Mountains in 1819, where he died in a few years, but never returned to St. Louis; that in 1828 said Rosalie married one Paul Morris, who died in 1832; that she married again with one Victor Chataigne, who died in 1853, and she herself died in 1858, leaving a will in which she devised one-third of her property to the children of Laurent, who are the plaintiffs in this suit. The evidence tended to show that said Rosalie occupied the premises by herself and tenants till her death in 1858.

It further appears that defendants offered in evidence a deed executed by said Lange Allard on the 9th of June, 1821, conveying one undivided half of the lot in question to Horatio Cozzens, in trust for said Rosalie for life, then to said Allard during his life, and remainder to the children of said Rosalie, viz: Laurent and Archange. This deed purports to be acknowledged personally, before a justice of the peace of St. Louis county, on the day of its date, and was duly recorded on the 5th day of November, 1823. This deed was received in evidence, over the objection of plaintiffs, and it is insisted by counsel that this action of the court was erroneous, inasmuch as the agreed statement of facts showed that Allard went to the Rocky Mountains in 1819, and died there a few years thereafter, but never returned to St. Louis. We are of the opinion that it was not intended by this admission to concede that the certificate of acknowledgment appended to the deed was a nullity, but that it was intended as an admission that Allard had, in 1819, abandoned St. Louis as his home and taken up his residence elsewhere. If the admission was intended to have the scope contended for by counsel, viz: that the certificate of acknowledgment in which it is stated that Allard personally appeared before the justice in St. Louis

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county was false in fact, it ought to have been so expressed in terms and not by indirection.

As was said by Judge Bakewell in the opinion delivered by the court of appeals, that "there is nothing tending to show that the justice was not a justice of the county of St. Louis in which the land lay. There is an admission that Allard was not in St. Louis after 1819. But there is no admission that he was not in St. Louis county on the 9th of June, 1821, and it appears by the certificate that he was actually in that county at that time."

Besides this we can take judicial notice of the fact, that at that time, the city of St. Louis was the county seat of St. Louis county, and there is no inconsistency between an admission that Allard, after 1819, was never in St. Louis, and the statement in the certificate, that he was in St. Louis county in June, 1821, where his acknowledgment was taken, especially when in 1821 the northern boundary of St. Louis county extended up the Missouri river as far as the mouth of the Gasconade.

It is also claimed by counsel that said Rosalie by virtue of her possession of the premises in dispute from 1818 to the time of her death in 1858, had acquired the Allard title, and that plaintiffs were, therefore, entitled under her will to one-third, instead of one-sixth of the lot, which was all that was adjudged to them in the judgment appealed from. The question as to the character and legal effect of the possession of said Rosalie was fully considered by this court in the case of *Sutton v. Casseleggi*, 77 Mo. 397, where the Montague deed, made the 18th of June 1818, to said Rosalie and Allard, and the deed of Allard to Cozzens on the 9th of June, 1821, were before the court for construction, as well as the question what interests were passed and acquired under them, and it was there held that under the Montague deed, said Rosalie only acquired one-half interest in fee in the premises, and that Allard acquired the other half; that under the Allard deed to Cozzens she acquired a life interest in his undivided half which terminated

at her death in 1858; that her possession was not adverse as to the undivided one-half of said Allard, that at the time of her death, she was only seized of an estate in fee of an undivided half of the premises; that under her will one-third of her interest passed to the children of her son Laurent. This case seems to be decisive of the point, raised by counsel for the plaintiffs, the children of said Laurent, who recovered one-third of one-half, equal to one-sixth, and under the ruling in the above case, this was the true measure of their interest, and all they were entitled to recover.

It is, also, insisted that the judgment is erroneous, in that, the court refused to allow damages to plaintiffs for the rents and profits of the premises for five years next preceding the commencement of the action. Under section 2252, Rev. Stat., the right of a plaintiff in an ejectment suit to recover the rents and profits, for any period previous to the commencement of the suit, is predicated on the fact that the defendant had knowledge of the plaintiff's title, and it is only when such knowledge is brought home to the defendant that such a recovery can be had. The only reference contained in the bill of exceptions as to such notice or knowledge is as follows: "Plaintiff also offered in evidence the record of the suit of *McDowell v. Little et al.*, reported in 33 Mo. 523, to show that Jesse Little, tenant of Mrs. Rosalie Chataigne, sued for the possession by Archange McDowell and Laurent Roubidoux, had a recovery against him in the circuit court for the property in dispute, but in the supreme court it was reversed and final judgment rendered in her favor, and also to show that defendants had notice of plaintiffs' title." This evidence the court refused to receive, on the ground that it was incompetent, and irrelevant, and this action of the court it is claimed is erroneous. As the record of said suit offered in evidence is not contained in the bill of exceptions, we cannot say that the court erred in excluding it, but on the contrary must presume that the action of the trial court



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with the record before it, in not receiving it in evidence was rightful, especially so as it does not appear that the defendant was a party to that suit.

Judgment affirmed, in which all concur, except SHERWOOD, J., absent.

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WELSH *et al.* v. THE JACKSON COUNTY HORSE RAILROAD  
COMPANY, *Appellant*.

**Negligence: DEATH OF CHILD: DISCOVERY OF ITS DANGER.** In an action for the negligent death of plaintiffs' child, caused by one of defendant's horse railway cars running over it, an instruction is properly refused which exempts the defendant from liability, unless the driver could have stopped the car in time to have prevented the accident after the dangerous situation of the child was discovered. Such instruction is defective in ignoring the question whether or not the driver, in the exercise of ordinary care, could have discovered the child in time to have prevented the accident, for if he could so have discovered the child, the defendant would still be liable.

*Appeal from Jackson Special Law and Equity Court.*—HON.  
R. E. COWAN, Judge.

AFFIRMED.

*Wells H. Blodgett* for appellant.

The defendant was entitled to have given the eighth instruction asked by it. *Maschek v. Railroad Co.*, 71 Mo. 276; *Devitt v. Railroad Co.*, 50 Mo. 305; *Morris v. Platt*, 32 Conn. 82.

*Tichenor & Warner* for respondent.

Only ordinary care was demanded of the driver of the car. Can it be true that the lowest degree of care is not required of a street car company which takes up one-fourth

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of a much traveled street in a large city, with three cars passing at one point, and that to in reference to a helpless child? *Frick v. Railroad Co.*, 75 Mo. 609. The counsel for the defense below could not deny this, and the fifth instruction given for the defendant is fully as strong as the one given on this point at the instance of plaintiff. The young and the old, the lame and infirm are entitled to the use of the street, and more care must be exercised toward them by persons controlling or managing cars and vehicles than toward those who have better powers of motion. *O'Flaherty v. W. R. Co.*, 45 Mo. 73; *Koons v. Railroad Co.*, 65 Mo. 592; *Monerman v. Stewarts*, 71 Mo. 101; *Bell v. Railroad Co.*, 72 Mo. 61; *Frick v. Railroad Co.*, 75 Mo. 610. Cooley on Torts, page 683, says: "Thus a person driving rapidly along a highway where he sees boys engaged in sports, is not at liberty to assume that they will exercise the same discretion in keeping out of his way that would be exercised by others, and ordinary care demands of him that he shall take notice of their immaturity and govern his actions accordingly." See authorities note 4, also note 3, p. 681; *Railroad Co. v. Gladman*, 15 Wall. 401. The defense presents this doctrine very forcibly in their instruction No. two. Defendant's No. three should not have been given, because there was no evidence upon which to base it. *Koons v. Railroad Co.*, *supra*. Five instructions were given at defendant's instance, on the subject of contributory negligence, and the one refused was on the same subject, and covered by those given. When the evidence as to negligence is conflicting, the case should be submitted to the jury. *Railroad Co. v. Stout*, 17 Wall. 664.

RAY, J.—The plaintiffs, who are husband and wife, began this action in the special law and equity court of Jackson county, to recover of defendant the sum of \$5,000 for the death of their infant son.

On the 4th day of September, 1878, after the father, who was a laboring man, had gone to his work, the child

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named Robert, who was under six years of age, left the premises where the plaintiffs were living, without their consent, and, in a short time afterward, was run over and killed by a street car of the defendant in the day-time upon Union Avenue, in Kansas City, and at a point about opposite the Union depot. The defendant had its street car tracks laid on Union Avenue where the child was run over. The car in charge of a driver named Patrick Scanlon, was coming up from the bottoms toward the city on the track next to the depot. At the same time two other cars, belonging to defendant, were going in the opposite direction upon the other track. A driver named Burnes was in charge on the one in front, and the witness Mahoney was in charge of the other. The material averments in the petition are to the effect that Robert Welsh, an infant, under six years of age, whilst lawfully upon Union Avenue, a public thoroughfare in Kansas City, was run over and killed by one of defendant's street cars by reason of the carelessness, negligence and disregard of duty on the part of the driver in driving the car at an unusual rate of speed, and in failing to keep a proper lookout for persons on defendant's track when, by so doing, he could have discovered said infant in time to have prevented the car from running over him.

The answer admitted the incorporation of defendant, but denied every other allegation of the petition, and further charged that the child came to its death by reason of its own carelessness and the negligence of the plaintiffs. Upon these issues the plaintiffs obtained a verdict and judgment for \$5,000.

It is not necessary, we think, to set out at length, or in detail, the evidence in the case. As it stands before us for our determination, it may be assumed that there was sufficient evidence as to the conduct of the child, the rate of speed at which the car was being driven at the time, and as to and concerning the conduct of the driver, to justify and require the trial court to submit the case to the jury. Indeed this was virtually conceded, we think, upon the

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oral arguments before us, and is so conceded in the brief of appellant on file. At the conclusion of the testimony the court, at the request of plaintiffs, gave to the jury four instructions.

The first declared, that if by the exercise of ordinary care and prudence the driver might have seen the child and stopped the car in time to have avoided the killing; or if by the exercise of ordinary care and prudence, under the circumstances, the driver might have avoided driving over the child, plaintiffs must recover. The second told the jury that children were entitled to the use of the streets, and that more care should be exercised toward them by persons managing cars and vehicles, than toward persons of mature years, and that plaintiffs' son was only required to exercise care and prudence equal to his capacity. The third pertained to the conduct of the parents, and told the jury that they might consider the inability of plaintiffs to employ a nurse; and also whether they suffered the child to go from their home, or whether the child wandered away unknown to them. The fourth pertained only to the measure of damages.

At the request of defendant the court also gave to the jury a number of instructions.

The one numbered two, (but being the first given for defendant,) defined the duty of parents toward their children, and declared that in this case the plaintiffs should have exercised a degree of care in proportion to the helplessness and indiscretion of the child. The one numbered three also pertained to the duty of parents, and told the jury that plaintiffs could not recover if they negligently permitted their child to wander into the street, where it was killed, without negligence on the part of defendant. The fourth told the jury that it was the duty of the child to exercise care in proportion to its capacity, and that if the want of such care on the part of the child was the proximate cause of its death, the plaintiffs could not recover.

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The fifth and six, also given, are as follows:

5. Although the child was run over and killed by one of defendant's cars, yet if the driver of the car at the time was using such care and caution as a prudent person would have used under like circumstances, or if the accident could not have been avoided under all the circumstances of this case by the use of such care and caution, then your finding should be for the defendant.

6. If you believe from the evidence that the child either got on the rear end of one of the defendant's cars while in motion, or was holding on to the same, and just as a car of defendant's was passing in an opposite direction the child jumped off or stepped off on the inside of the line of the two cars, at or near to the feet of the mules drawing the car thus going in an opposite direction, and thereby frightened said mules, was run over and killed, and such child was not seen by the driver of such mules in time to stop his car and to avoid the accident, then you should find for the defendant.

The seventh, also given, was the same, in substance, as the fifth.

In regard to the foregoing instructions, the only criticism made upon them by counsel for defendant is, that while they may be abstractly correct, they are, with the exception of the sixth, too general, and are not applications of the law of the case to the particular and specific facts in evidence.

The defendant, also asked the following instruction, numbered eight, which the court refused to give:

8. If you find that two of the cars were going in opposite directions, one toward the bottoms and the other up town, and although the child may not have been on or holding to either of them, still if it attempted to cross the street, and in doing so was going or passing behind the car going towards the bottoms, so that the driver of the car going in an opposite direction *did not see it* until it got under the feet of his mules, that the mules were thus



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frightened and the child run over and killed, and the driver could not have avoided the accident after he saw the child, then your finding must be for the defendant.

This action of the court is, we think, the only question now before us for our examination. On the trial of the cause the witness, Thos. Mahoney, who was the driver of the rear car of the two going south, testified, in effect, upon this point, that the boys were riding or holding for a distance of seventy-five or 100 feet on the rear of the front car going south, and that the boy who was run over jumped from behind the car under the feet of the mules going north; that the mules were frightened and jumped to the right, toward the depot, and that the boy was run over before the driver could stop. To meet the evidence of this witness and evidence of this description, the instruction No. 6, set out above, was asked by the defendant and given by the court. But there were, as contended by defendant, other witnesses in the case who did not testify as Mahoney did, that the boy got or rode on the rear of the front car for any distance, but testified on the contrary, in effect, we think, that the boy ran straight across the street and passed close behind the car going south and in our judgment, as counsel say, the preponderance of the testimony seems to be against the evidence of Mahoney on this point. Under the sixth instruction, thus given as applicable to the facts testified to by Mahoney, the jury, it will be seen, were required to believe, among other things, that the child either got on or was holding on to the rear end of the car going south, before their verdict could be for the defendant. Defendant's counsel contends that defendant was entitled to have said instruction, No. eight, also given to the jury, so that they should be fully instructed as to how they should find under each of the above alternatives presented by the evidence. In the absence of other instructions in the case covering the same ground, the defendant, we think, would have been entitled to a submission of this evidence to the jury under proper instruction. The plaintiffs' counsel con-

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tend that the subject matter of the refused instruction had been already covered by correct instructions given in the case in other forms. Whether this was so or not, or whether under the circumstances of this case the court was justified upon that ground in refusing said instruction, we cannot say that there was error in the action of the court in so doing, because the instruction itself, as applied to this case, and in the form in which it was asked, we do not think was correct.

Instructions employing the language and qualifications which we deem objectionable in this are to be found, we are aware, in numerous decisions; but, we think, they have been approved in cases, for the most part, at least, substantially different from the case before us in the elements of time, circumstance and place, and in the character and capacity of the persons injured. In the case of *Frick v. Railroad Co.*, 75 Mo. 595, the qualifications contained in said instruction No. 8, were disapproved and held inapplicable to a class of cases to which we think this case belongs. In that case the child, Lulu, who was about two years old, had escaped from its parents and was shortly afterward run over by the cars on the railroad track between two streets in the city of St. Louis. A brakeman who was on the front car nearest the child testified that he saw the child upon the track when the car was about one or two lengths from the child, and that after the child was discovered it was impossible to stop the train in time to avoid the injury. There was a conflict of evidence, among other things, as to the length of time the child was in a dangerous position on the track. And an instruction containing, as we think, similar qualifications to the one before us was asked by the defendant in that case and was refused. In approving the action of the court in that behalf this court there said: "The second instruction asked by defendant was properly refused for the reason that it exempts the defendant from liability, unless the train could have been stopped in time to have prevented the accident after the dangerous situa-

tion of plaintiff was discovered. This instruction should have been qualified by adding after the word 'discovered' the words 'or by the exercise of ordinary care would have been discovered.'" In the same case the court further said, "we are of the opinion that if the servants of defendant saw, or, by the exercise of ordinary care, under the circumstances stated, could have seen the plaintiff in time to have avoided injury to her and failed to do so the defendant is liable."

So in this case, we think the instructions should have been qualified so as to come within the operation of the above rule, and thus embrace the question whether or not the driver, in the exercise of ordinary care, could have seen the child in time to prevent the accident. We do not think that we are authorized to assume in this case that the physical facts themselves which may be thought implied or involved in this instruction were such that the driver necessarily could not see the boy until it was too late to prevent the car from running over him. It follows from these views that the action of the court in refusing said instruction was not error, and the judgment of the trial court must, therefore, be affirmed. All concur, except SHERWOOD, J., who is absent.

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SCHOOL DISTRICT NO. 1 *et al.*, Appellants, v. RHOADS.

1. **School Tax:** RAILROADS. Under the act of 1877, (Laws 1877, § 1, p. 365, Laws 1875, § 1, p. 129, amended,) the fund arising from the taxation of railroads goes exclusively to the school districts in the townships only when such townships have made valid subscriptions to the railroads. When no such subscriptions have been made by the townships, the fund is distributed ratably among all the districts of the county, except that the taxes arising from land, depots, workshops and other buildings, belonging to the railroads, shall go to the districts in which such property is situated.
2. **The Court** in this case properly found for the respondent, and dismissed the proceeding.

*Appeal from Wayne Circuit Court.*—HON. R. P. OWEN,  
Judge,

**AFFIRMED.**

*C. D. Yancy with Smith & Krauthoff for appellants.*

This cause should be reversed, because of the refusal of the court to separate the funds which arose from the taxation of the lands, depots, workshops and other buildings, from such other funds as arose from the taxation of the road-bed, rolling-stock and movable property. Laws 1875, p. 129; Laws 1877, p. 365; R. S. 1879, § 6880; Laws 1883, p. 155.

*Nalle & Edwards for respondent.*

This cause should be affirmed upon the authority of *School District No. 1 v. Weber*, 75 Mo. 558, 559, which fully settles the law of the case.

PHILIPS, C.—This is a proceeding by mandamus, instituted in the Wayne circuit court, against the county clerk to compel the apportionment of certain moneys among the relators as school districts, which moneys are alleged to have arisen from taxation of the road-bed, rolling-stock and movable property, and from the lands, depots, workshops and other buildings, belonging to the St. Louis, Iron Mountain & Southern Railway Company, running through and situate in said school districts. The said districts do not compose all the school districts in said county.

The petition discloses the fact that for the year 1877 the taxes levied on and collected from the railroad property in said county, for the benefit of the schools therein, amounted to \$1,726.16, which sum was paid into the treasury of said county, and was waiting the proper order of distribution among the districts. The petition further averred that neither the said county, nor any of the town-

ships, cities or towns of the county, had ever made any subscription of money to or in any wise aided in the construction of said railroad to, or through the county, and that no property therein had ever been assessed or taxed to pay any such subscription to the capital stock of said road or otherwise. The complaint made of the respondent, the county clerk, is, that in disregard of his duties and the law in that behalf, he threatens and is about to proceed to apportion and distribute the said moneys "to and among all the districts in the county, as well amongst those districts through which said railway runs and wherein the property thereof is situated, as amongst those other districts off the line of said railway and remote therefrom, thereby designing and intending to divert unlawfully, fraudulently and wrongfully the moneys arising from the special taxation of property situated solely within said districts, relators herein, to the use and benefit of strangers, districts wherein no part of the property taxed is situated, contrary to the constitution of the State and the statute in such case made and provided." The prayer of the petition is to have the respondent distribute the whole of said fund among the relators, in the proportion shown by the petition.

To the temporary writ granted on this petition the respondent made return, raising issues as to the sufficiency of the allegations of the writ, as also touching his custody of the said funds, also, as to the character of the funds held by the treasurer. The return then proceeded as follows:

6th. The respondent further states that it is not his duty to distribute the funds described in said writ and said petition of relators, in the manner alleged, or that said relators are entitled to have school funds obtained as alleged distributed as alleged; but avers the truth to be that such school funds derived from the alleged source, are distributable and apportionable in manner following: The county clerk should apportion the said school taxes so levied and collected among all the school districts in his county, in proportion to the enumeration of each district, *provided* that all lands,



workshops, depots and other buildings belonging to said railway company which lie in any school district, the school taxes thereon shall go to the district in which such lands, depots, workshops or buildings are situated; and that only to the exception stated, the said school taxes, so derived, are apportioned to all of the school districts in the county.

7th. Respondent further states that he will, *provided* the funds alleged are school taxes derived from the alleged source, and do not include taxes derived from lands, workshops, depots and other buildings belonging to the alleged railway situated in particular districts, distribute and apportion the alleged, and all school taxes so derived, among all the school districts in said Wayne county in proportion to the enumeration returns of each said district. Respondent further says that he has no knowledge or information of or concerning the alleged school tax, or how the same, or any part thereof, was levied and collected, or as to whether the same, or any part thereof, was derived from lands, workshops and other buildings situated in either of the complaining districts, relators herein.

8th. Respondent further returns and answers, by denying each and every allegation, averment, statement and fact, material and immaterial, contained in said writ and petition of relators not hereinbefore admitted in express terms and by implication.

At the hearing of the case the following agreed statement of facts was submitted:

"1st. That the several districts, relators herein, are now and were at the time of the assessment, levying and collection of the taxes upon the taxable property of the St. L., I. M. & S. Ry. Co., within Wayne county, Missouri, and the districts, relators herein, referred to in the pleadings herein, and in this controversy involved, each and every of them, were bodies politic and corporate, duly created and existing under the laws of the State of Missouri.

2nd. That the St. L., I. M. & S. Ry. Co. passes through the said school districts, relators herein.

3rd. That the sum of money in controversy herein, arose from the taxation of the road-bed, rolling stock and movable property, and from the lands, depots, workshops and other buildings, the property of the St. L., I. M. & S. Ry. Co., situate in said districts, relators herein, for the year 1877.

4th. That the said St. L., I. M. & S. Ry. Co. is a body politic and corporate duly existing under the laws of the State, and that said corporation was, at the time aforesaid, and now is the owner of the road-bed, rolling-stock and movable property, and of the lands, depots, workshops and other buildings, held, used and occupied by said corporation in Wayne county, and in the said several school districts aforesaid, relators herein.

5th. That the respondent was and now is the clerk of the county court of Wayne county, Missouri, duly commissioned and qualified to act as such.

6th. That the sum of money in this controversy involved, is now in the treasury of Wayne county, Missouri, and subject to apportionment amongst the several school districts entitled thereto as provided by law."

Upon this state of facts the court refused to make the writ perpetual, and dismissed the proceeding. The relators have appealed to this court.

I. It is obvious, both from the petition and argument of appellants, that this proceeding was based on the assumption that under the statute applicable to the case, the whole fund, arising from the taxation of railroads for school purposes should be distributed solely to the school districts through which the road runs. If this be the correct construction of the statute the circuit court erred in denying the continuance of the peremptory writ. The acts pertinent to this case are to be found in the Laws of Missouri, 1875, page 129, section 1, as amended by the act of 1877, Laws of Missouri 1877, p. 365, section 1. The palpable meaning of these acts is, that the fund arising from the taxation of railroads goes exclusively to the townships, etc.,

only when such preferred townships, etc., have made valid subscriptions, etc., to the railroads. Where, as in this case, no such subscription has been made by the townships, the fund is distributed among all the districts of the county ratably, with the exception that the taxes arising from the lands, depots, workshops and other buildings belonging to the railroad "shall go to the district in which such lands, depots, etc., are situate." Since writing the foregoing my attention has been called to the case entitled "*In the Matter of the Apportionment of the Railroad School Tax in Caldwell County*," 78 Mo. 596. This decision is in harmony with the conclusion I have reached.

II. But appellant contends that notwithstanding this construction be proper, nevertheless the circuit court erred "because of its refusal to separate the funds which arose from the taxation of lands, depots, etc., from such other funds which arose from the taxation of the road-bed, rolling-stock and movable property. This is followed by the assertion that "the court ordered this money (arising from the lands, etc.) distributed among the outlying districts off the railway." This, we think, is a misconception, both as to issue tendered by the pleadings, and the effect of the judgment of the court. The evident object, as already stated, of this proceeding was to compel the clerk to distribute the whole fund arising from both sources to the school districts penetrated by the road. The answer of the respondent tendered the issue that this was not the legal way for the distribution of this fund; but declared the willingness of the respondent to distribute according to the statute, as we have interpreted the same. He is not, therefore in default. The court, on the issue made by the pleadings, found for the respondent, denying a further continuance of the writ; and simply "adjudged that a peremptory writ of mandamus be refused, and that defendant recover of said relators his costs," etc. The court made no order in respect to paying over the fund, but left the clerk to pursue the law. There is nothing in this record to justify the

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inference that the clerk proposes to distribute the taxes arising from the railroad lands, depots, etc., among districts other than those in which such real estate is situate.

The judgment of the circuit court should, therefore, be affirmed. All concur.

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THE STATE *ex rel.* THE CIRCUIT ATTORNEY V. MCCANN, *Appellant.*

**Justices of the Peace: EXTENSION OF TERMS OF OFFICE: STATUTE.**

The effect of section 2807, Revised Statutes, 1879, in reference to the election and terms of office of justices of the peace, was to supersede and repeal all prior statutes authorizing directly, or by implication, any elections of such officers prior to the general election in November, 1882, and any election so held in contravention of said section, was unauthorized and void. Following and affirming *State ex rel. Attorney General v. Ranson*, 73 Mo. 78.

*Appeal from St. Louis Court of Appeals.*

**AFFIRMED.**

*J. J. McCann* and *A. R. Taylor* for appellant, cited R. S. 1879, §§ 2805, 2807, 2809; *Cooley's Const. Lim.*, p. 646; *Leonings v. Co.*, 20 N. Y. 447; *McCrary on Elections*, §§ 69, 186, 191, 231, 238, 249, 253, 261, 263 and notes; *People v. Ohio Grove*, 51 Ill. 191; *State v. Boal*, 46 Mo. 529. The case of the *State ex rel., etc., v. Ranson*, 73 Mo. 78, is inapplicable to the facts of this case.

*E. A. B. Garesche* and *John M. Holmes* for respondent.

EWING, C.—This is an information in the nature of a *quo warranto* to the circuit court of St. Louis, wherein it is stated that Vincent F. Mullery was a duly elected and qualified justice of the peace in a certain district in St. Louis, elected in November, 1878, for the term of four years; that

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he resigned October 29th, 1879. That, thereupon, Michael I. Mullery was appointed as his successor by the mayor of St. Louis, and qualified and entered upon the duties of his office. That on the 18th of November, 1880, the respondent, McCann, usurped said office of justice of the peace, and is unlawfully exercising the same.

The respondent, for return to the writ issued to show cause, admits Vincent F. Mullery's election and resignation and appointment of Michael I. Mullery by the mayor, but alleges that, at the time, Michael I. Mullery was not a resident of the district for which he was appointed, and was, therefore, ineligible, and the office became vacant, until McCann's election in November, 1880, and claims the office by virtue of his election. The relator demurred to this return, because, under the law, no legal election could be held for justice of the peace. This demurrer was sustained, and the respondent not pleading further, judgment of ouster was entered, from which respondent appealed to the St. Louis court of appeals, where the judgment of the circuit court was affirmed, and the respondent again appealed to this court.

The question for consideration and decision in this case is, has the respondent usurped the office of justice of the peace, as alleged by the relator? The question of Mullery's eligibility is not necessarily before the court. If Mullery cannot hold the office for any cause, it does not, therefore, follow that McCann is legally entitled to the office. *State ex rel. Attorney General v. Townsley*, 56 Mo. 107; *State ex rel. Attorney General v. Vail*, 53 Mo. 97. The respondent, as we have seen, claims title to the office by virtue of an election on November 5th, 1880, and by authority of a commission issued by the mayor to respondent. This being undisputed, the question resolves itself into an inquiry as to the validity and legality of the election of justice of the peace in the year 1880. This question has been directly passed upon by this court in the *State ex rel. Attorney General v. Ranson*, 73 Mo. 78. There the court was discussing



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the validity and scope of section 2807, Revised Statutes 1879. It was an information in the nature of a *quo warranto* for the purpose of testing the right to the office of justice of the peace of the respondent, Ranson, who had been elected at the general election in 1880, and duly commissioned by the county court, and under which Ranson was claiming the office. The court say: "The effect of the enactment, it may be granted, was to supersede and repeal all prior statutes authorizing directly, or by implication, one and all elections of justices of the peace prior to November, 1882." This is unmistakable language. But it proceeds even yet more pointedly: "It follows from this, that the recent election in Kaw township held in November, 1880, \* \* \* was not a valid election, and that it failed to furnish any duly elected and qualified successor to respondent." Justices of the peace can only be elected by virtue of the statute, and in the absence of such authority, such election is void.

The judgment of the court of appeals is affirmed.  
All concur.

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METHUDY *et al.*, Plaintiffs in Error, v. Ross *et al.*

1. **Contract: EVIDENCE.** That a contract was to be subsequently reduced to writing, is not proof that there was no final agreement between the parties.
2. — : — : **PRESUMPTION.** When the agreement was to be reduced to writing, and there is no sufficient evidence from which its exact terms can be determined, it will be inferred that the understanding of the parties was, that there was no contract until the terms were reduced to writing.
3. **Practice, Civil: DECLARATIONS OF LAW.** The giving of an ambiguous declaration of law, in a trial before the court, is not necessarily ground for a reversal.
4. — : — . In a trial before the court, parties should ask

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for declarations of law from which it can be determined what the court held as to the law, and what it found as to the facts.\*

*Error to St. Louis Court of Appeals.*

AFFIRMED.

*H. I. D'Arcy* and *Charles Nagel* for plaintiffs in error.

*Krum & Jonas* for defendants in error.

NORTON, J.—This suit was instituted in the circuit court of the city of St. Louis, to recover damages for an alleged breach of contract of sale of a lot of lumber. The case was tried by the court, without the intervention of a jury, and judgment was rendered for defendants, from which the plaintiffs prosecuted a writ of error to the St. Louis court of appeals, where the judgment of the circuit court was affirmed, from which judgment of affirmance plaintiffs prosecute their writ of error to this court.

After careful examination of the record, we are satisfied that the judgment of the circuit court was for the right party. The criticisms made by the learned counsel for plaintiffs in error on the instructions given and refused by the court, do not affect the merits of the case. While some one of a number of instructions given may be faulty, yet when the conclusion reached by the jury is manifestly right, and a different result could not have been reached without injustice, the verdict on that account ought not to be disturbed. *Noble v. Blount*, 77 Mo. 235.

The evidence and instructions are fully set out in the opinion of the court of appeals reported in 10 Mo. App. 101, and for the reasons therein given for the conclusion arrived at by that court, its judgment affirming that of the circuit court is hereby affirmed, in which all concur.

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\* These syllabi are taken from 10 Mo. App. 101.

COOPER V. JOHNSON, *et al.*, Appellants.

1. **Trespass, who are Principals in.** Any person who is present at the commission of a trespass, encouraging or inciting the same by words, gestures, looks or signs, or who, in any way, or by any means countenances or approves the same, is, in law, deemed to be an aider and abettor, and liable as a principal.
2. **Jurors, Understanding of Ordinary English Words.** Jurors are presumed to understand the meaning of ordinary English words, and to know that to "countenance" an act is to aid in or abet it, and that one by mere silence at the time, or approval of an act after its commission, cannot be held thereby to countenance the same or be held liable therefor.
3. **Practice in Supreme Court: INSTRUCTIONS.** Where there is anything in the pleadings, the testimony or instructions to warrant the conclusion that but for the faulty phraseology of an instruction complained of, the jury would not have found a verdict, the Supreme Court will reverse the judgment, but otherwise, when from all of the instructions the jury could not have misconstrued the one complained of.
4. **Instructions.** Instructions asked are properly refused when embraced in others given.

*Appeal from Henry Circuit Court.*—HON. J. B. GANTT,  
Judge.

AFFIRMED.

*M. A. Fyke, R. C. McBeth and F. P. Wright* for appellants.

The court erred in overruling the demurrer to the evidence. There was nothing in plaintiff's evidence to show that defendant Johnson was present at the time of the arrest, or in any wise participated in it, or even knew of it until after it was made. The court erred in its instructions to the jury on the part of plaintiff, and in refusing instructions asked by defendant. As the principals were acquitted Johnson cannot be held liable, when nothing was done by his direction. This is a civil case, and, as at common law,

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if the principal is acquitted, the accessory cannot be held liable. 2 Starkie on Ev., 14.

C. A. Calvird and Charles B. Wilson for respondent.

In trespass all are principals. *Canifax v. Chapman*, 7 Mo. 175; *Page v. Freeman*, 19 Mo. 421; *Murphy v. Wilson*, 44 Mo. 313; *Goetz v. Ambs*, 27 Mo. 32; *State v. Jones*, 83 N. C. 606, 607. The evidence of the plaintiff directly implicated defendants Cannon, McDowell and Johnson. The instructions given by the court, taken as a whole, fairly presented the law applicable to the case. The word "countenance" was properly used in the instruction. Its use has been approved in adjudicated cases. *Brown v. Perkins*, 1 Allen 89, 98; *McManus v. Lee*, 43 Mo. 208. Instructions are to be considered in their entirety and relations to each other, and this court will not reverse because of some verbal defect in one of them, when it is obvious from the whole context the defect did not mislead. *McKeon v. Citizens' R'y*, 43 Mo. 405; *Nelson v. Foster*, 66 Mo. 381; *Parton v. McAdoo*, 68 Mo. 327; *Brown v. Ins. Co.*, 68 Mo. 133; *Noble v. Blount*, 77 Mo. 235. It is not error to refuse instructions embraced in those given. *Graham v. Railroad Co.*, 66 Mo. 536; *State v. Walton*, 74 Mo. 271; *Nugent v. Curran*, 77 Mo. 323.

HENRY, J.—This suit is for assault and false imprisonment. The plaintiff resided about two miles and a half from the town of Montrose, and went to the town to procure medicines for his wife, and when on his way home was arrested in a street of the town by defendants, Cannon and McDonald and forcibly and rudely taken to the calaboose, where he was locked up for about an hour. He testified that after he had been confined in the calaboose, as above stated, he was taken before Blew, one of the defendants, who was mayor of the town, who discharged him and he went home, but returned the same afternoon and met defendant, Johnson, and asked him the names of the men who had arrested

him. Johnson said it made no difference, that they acted under orders of the board, and if the board had not authority he would look to it, and they would have a civil suit and no bad feeling about it. He also testified that Johnson told him that he was one of the board (and there seems to be no question that he was) and that the reason they had it done was that four or five persons had been to the board yesterday and told them plaintiff had been to Clinton, exposed to small-pox. Collins testified that while the marshal was taking plaintiff to the calaboose, he saw plaintiff's son-in-law, Rhodes, following, and heard Johnson remark as they passed, that if Rhodes didn't mind he would get his head broken by the marshal. These witnesses were contradicted by witnesses introduced by the defense in all those portions of the testimony tending to implicate Johnson. The court at plaintiff's instance gave the following instructions:

1. If the jury finds from the evidence that the defendant, McDonald and one Cannon, on or about the 19th day of February, 1881, at the town of Montrose, in this county, seized the plaintiff and against his will forcibly carried or led him through a street of said town and confined him in a room or calaboose without any warrant authorizing them so to do, and that the same was willfully or maliciously done; and if the jury further believe from the evidence that the defendants, Blew and Johnson, or either of them, were *present aiding*, or abetting or encouraging the act, or that they, or either of them, in any way or by any means, either before the said arrest or at the time thereof, countenanced or approved the same, then either of them so aiding or countenancing the same, are liable as if he or they had actually seized and imprisoned the plaintiff, but the mere presence of said defendants, or either of them, will not of itself render them liable unless they were approving encouraging, countenancing the same. Malice, as used, in this case, does not mean mere spite or ill-will toward plaintiff.



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iff by defendants, but it means a wrongful act, intentionally done without legal justification or excuse.

2. The court further instructs the jury that while the burden of proof rests upon the plaintiff, the burden of law does not require that he should prove by direct testimony that either the defendants, Blew or Johnson, were heard to give a direct order to either McDonald or Cannon to arrest the plaintiff, but if the jury believe from all the facts and circumstances in evidence that both or either of said defendants encouraged, countenanced or approved the arrest or imprisonment, and that such arrest and imprisonment was without warrant and wrongful, then the jury should find for the plaintiff against such defendants, so believed by them from the evidence to have incited, encouraged, countenanced or approved such arrest.

3. The court instructs the jury that the fact that McDonald and Cannon were marshals of said town of Montrose did not justify them in arresting plaintiff or incarcerating him in the town prison without a warrant directing them so to do, and the fact that Blew and Johnson were members of the town board of said town did not authorize them, or either of them, in directing such arrest and incarceration.

4. The court instructs the jury that if they find for the plaintiff they will, in assessing the damages, allow plaintiff such amount as they think will compensate him for his loss of time and any other damages he may have actually suffered, and, in addition thereto, if the jury believes that the trespass was committed willfully and maliciously, as heretofore defined, they may also allow such further damages as they see fit as smart money or exemplary damages, not exceeding the amount of \$5,000, and in estimating the damages they may take into consideration the standing of the parties in the community, and also the mental anguish and pain which plaintiff suffered from such arrest and incarceration.

5. The jury are instructed that they may find against one or more of the defendants, and in favor of the others.

The court on its own motion, against the objections of defendants, gave the following instructions to the jury, to-wit:

5. The court instructs the jury that in this case the burden of proof is on the plaintiff to establish by a preponderance of evidence that the defendants, Blew and Johnson, or either of them, were present at the time of the committing of the trespass against plaintiff, aiding or abetting the said McDonald and Cannon in making the said arrest, or by some act or means approving or encouraging or countenancing the same, or that being absent said arrest was made with the knowledge or endorsement of said Blew and Johnson, or either of them, prior to the making of the same, and the mere presence of either Blew or Johnson at the time the arrest was made will not of itself make them liable, unless they by some means or act approved, encouraged and countenanced the same.

The court instructs the jury that before you can find against either Johnson or Blew in this case, you must believe from the evidence that such defendants were present and took part in said arrest, or being absent, said arrest was made with the knowledge and by the order or endorsement of such defendants prior to said arrest.

The defendants then and there at the time, excepted to the giving of said instructions.

The court refused to give the following instructions to the jury asked by defendants:

The court instructs the jury that unless they find from the evidence that O. F. Johnson and Elisha Blew were present and assisted in making the assault complained of, or were at the time present and aided and abetted the defendants, McDonald and Cannon, in such assault, they will find for the defendants, Blew and Johnson.

That although the jury may find from the evidence that Johnson and Blew were members of the town board, that defendants, Cannon and McDonald, were marshals of the town, and although the jury may find that the assault

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or arrest complained of was wholly unauthorized by law; yet unless defendants, Johnson and Blew, participated or aided in such arrest at the time, the jury will find for the defendants, Johnson and Blew.

The court instructs the jury that before you can find against the defendant, O. F. Johnson, you must believe from the evidence that said Johnson was present and took part in said arrest or imprisonment, or that the same was made by the order or direction of said Johnson, and the mere fact that said Johnson may have had knowledge that said arrest was made and did not interfere, would not render him liable.

The jury found a verdict for plaintiff against Johnson and in favor of the other defendants, and the court rendered a judgment against Johnson, from which he has appealed, and complains of the first, second and third instructions given for the plaintiff at his request, and that given by the court of its own motion numbered five. Of the first that there was no evidence tending to show that Johnson was present at the time of the arrest.

The evidence does not show that he was present when the officer first laid hands upon plaintiff, but very soon after he saw plaintiff in the custody of the marshals who were taking him forcibly to the calaboose. Nothing more is meant by the expression "present, at the time of the arrest," than that the party charged was sufficiently near the parties actually making it, to enable him by word, sign or otherwise, to aid, abet or encourage it. One may witness an arrest and not, in a legal sense, be present at the time of the arrest, for he might be in a place or position from which he could witness it, but could himself neither be seen or heard by the parties making the arrest. The arrest and imprisonment together constitute the matter of which plaintiff complains. Johnson might not have witnessed the first step taken by the marshal, but if he saw plaintiff in their custody on the way to the calaboose, and encouraged them in their proceeding, as a matter of law, he was

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present aiding and abetting, and must be held to the same liability as if he had been actually present when the officer first laid hands upon the plaintiff.

As to the first and fifth it is contended that the use of the word "countenanced" vitiates these instructions, by authorizing a verdict against Johnson, although he may have been in no wise connected with the arrest or imprisonment, simply because he failed to express his disapprobation, and further, that there was no evidence that he encouraged, countenanced or approved the arrest or imprisonment of plaintiff. With respect to the latter proposition counsel have either overlooked, or ignore, and expect this court to disregard, the testimony of plaintiff. We will not repeat it here. It is substantially stated above, and, if true, defendant was one of the board which ordered the arrest, and himself stated to plaintiff the reason for ordering it. As to the first of the above named objections to the instructions in *McManus v. Lee*, 43 Mo. 208, this court observed: "The law is well laid down that any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks or signs, or who in any way or by any means countenances or approves the same, is in law deemed to be an aider and abettor, and liable as a principal." In *Brown v. Perkins*, 1 Allen 89, the same language is held by the supreme court of Massachusetts, in commenting upon an instruction in which it was declared that: "All those present who countenance and approve the measures taken, or make no opposition, or manifest no disapprobation of them, are regarded as present aiding," etc. Bigelow, J. observed: "It is not accurate to say that all those present at the commission of a trespass are liable as principals, who make no opposition or manifest no disapprobation of another's person or property," and for this error held the instruction bad.

That one was present and witnessed the trespass, but neither by word, sign nor act, nor in any other manner, signified his approval of it does not render him liable. He

is not by his mere silence to be held as countenancing the act and jurors are supposed to know the meaning of ordinary English words, and not one of a hundred men of ordinary intelligence but knows that to "countenance" an act means something more than to witness it. Webster defines the word: "To encourage by a favoring aspect; to sanction; to favor; to approve; to aid; to support; to abet." Mere approval of a trespass, after it is committed by one for whose benefit it was not committed, will not make him liable. One may rejoice over a murder after its commission without for that being criminally liable; and so may one approve and applaud an assault and battery committed by one upon another without subjecting himself to liability to the injured party. Nothing in the instructions given is in conflict with these principles of law. In none of them was the jury authorized to find against Johnson, unless he encouraged the trespass at the time it was committed, or counseled or ordered it before it occurred.

Of the third instruction for plaintiff, the complaint is that it assumes that Johnson directed the arrest of plaintiff. There was evidence tending to prove that he did, and also testimony to the contrary, and while the instruction might have been more unexceptionably drafted, yet we do not think the jury could possibly have understood it as declaring that Johnson did direct the arrest, but only as declaring that the town board was not authorized to order it. If there was anything in the pleadings, or testimony, or instructions to warrant the conclusion that, but for the phraseology of that instruction, the jury might not have found a verdict against Johnson, it would be our duty to reverse the judgment. But in all the instructions, except this one, the question as to Johnson's having directed the arrest was expressly submitted to the jury as an issue in the cause, upon which they were to pass, and they could not have construed the instruction in question as a declaration of the court that that fact was, or that they were to accept it as proved. In the petition all of the defendants are sued as principals



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and that Johnson was present aiding and abetting, or being absent instigated and ordered the arrest, are only circumstances to prove that he was, as alleged, a principal in the trespass, and it was not necessary to allege in the petition any more than that he, with the others, committed the trespass.

The first instruction asked by defendant was properly refused. It virtually asserts that Johnson is not liable, although he may have ordered and directed the arrest, unless he was present when it was made participating and aiding. The others were properly refused because, in substance, embraced in plaintiff's, and those given by the court of its own motion. All concurring, the judgment is affirmed.

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TOWNE, *Appellant*, v. BOWERS.

1. **Injunction: STATUTE.** Injunction may be resorted to under Revised Statutes 1879, section 2722, notwithstanding there may be an adequate remedy at law for the injury, in all cases where such adequate remedy cannot be afforded by an action for damages as such.
2. **Sale of Land: CONDITION BROKEN: RE-ENTRY: CLAIM.** The remedy of the grantor of land, who has the right to re-enter for condition broken, is to enter, and when he cannot enter he must make a claim, and no one can make it for him except the heir.
3. **Tenant: GROWING CROP.** Defendant who was in possession of land, under a contract for its purchase, sowed a crop of wheat, and then, by mutual consent of himself and his vendor, the contract was cancelled, and a new similar one was made by the vendor with H., and it was agreed by the latter that defendant should retain possession as tenant without paying rent while his crop was growing, until the land could be sold, defendant at the time stating that he claimed the crop and intended to gather it. Plaintiff took a transfer of H.'s contract, and received a surrender of the premises from defendant, with the understanding, to which he made no objection, that the latter so claimed the crop and intended to gather it; *Held*, defendant was entitled to the crop.
4. **Emblements: TENANT AT WILL.** A tenant at will is entitled to

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emblems, and to that end the law gives him the right of ingress and egress to gather his crop.

*Appeal from Caldwell Circuit Court.*—HON. E. J. BROADBUSH, Judge.

AFFIRMED.

*Crosby Johnson* for appellant.

The sureties having accepted defendant's proposal, and having purchased new contracts to the land, became the owners of the wheat. Growing wheat is a part of the freehold, and passes along with the land on which it is sown. *McIlvaine v. Harris*, 20 Mo. 458; *Pratte v. Coffman*, 27 Mo. 424; *Steele v. Farber*, 37 Mo. 72; *Tripp v. Hasceig*, 4 Am. R. 388; *Baird v. Brown*, 28 La. An. 842. The fact that the grant which Bowers made to his sureties was not in writing, would not alter the legal effect of the grant, because Bowers did not have such an interest in the land as required a writing to transfer. Having failed to meet his payments to the railroad company as they became due, he occupied the position of a strict tenant at will. Washb. Real Prop., (2 Ed.) 376\*, § 25; Taylor's L. and T., § 25. He was not entitled to notice to quit. *Glasscock v. Robards*, 14 Mo. 350; Tyler on Eject., 216. "He had no certain, indefeasible estate, nothing which he could assign." 1 Wash. Real Prop., (2 Ed.) \*370, § 2; Taylor's L. and T., § 62. The company could have ousted him by ejectment. *Gibbs v. Sullens*, 48 Mo. 237. And have taken the crop with the land. Freeman on Execution, § 474; *McLean v. Bovee*, 1 Am. R. 185. A strict tenant at will, which defendant was, is not entitled to emblems. Taylor on Landlord and Tenant, §§ 60, 537. Even if it be conceded that under the first agreement between Bowers and his sureties, he would have been entitled to the emblems had he planted the crops during the tenancy, still the right was abrogated by the second agreement between them.

*J. A. Holliday* for respondent.

Bowers was Houghton's tenant at will, and was entitled to the growing crops. 1 Washb. Real. Prop., p. 506; 2 Flint Real Prop., 216; *Davis v. Thompson*, 13 Me. 209. When a tenancy is terminated by the act of the landlord, or by notice to quit, the tenant is entitled to the growing crops. Taylor Landlord and Tenant, § 535; 9 Johns. 108. The case of *McIlvaine v. Harris*, 20 Mo. 458, is not in point; in that case McIlvaine sought to contradict his deed by parol, but in the case at bar no deed or written conveyance was offered in evidence, nor is it pretended that Bowers sold to plaintiff.

PHILIPS, C.—This is a proceeding by injunction. The petition avers that plaintiff is the owner of certain real estate, on which there was then growing about ten acres of wheat, and that petitioner is in possession of the land and wheat. It is then averred that the defendant sets up claim to the wheat, and threatens to enter upon said land to cut and carry the wheat away. The insolvency of the defendant is averred, and the prayer is, that defendant be enjoined from cutting, removing, or in any manner interfering with said wheat.

The answer admits plaintiff's ownership of the land, but denies his alleged ownership of the wheat, as, also, his possession. It then pleads that prior to the month of March, 1878, when the title of plaintiff to said land first accrued, the defendant was in possession of the same lawfully, and while he so held it he cultivated it and sowed said wheat thereon; that at and before the plaintiff purchased the same, and at the time defendant surrendered possession of any part of the land, he notified the plaintiff that he retained the possession of said wheat and land, and reserved to himself the exclusive right to enter and harvest the same. The further defense is made that at the time the action was brought by plaintiff the defendant had already cut and

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shocked the wheat on the ground in said field. The reply is a general denial.

The evidence on plaintiff's behalf, tended to prove that the defendant was in debt, and that one Houghton, Halstead and Kautz were sureties for him in considerable sums, and defendant to protect them, proposed to turn over to them certain lands he had bought of a railroad company, and other property mentioned. It appears from the parol statement of Houghton on the witness stand that defendant held said land under a contract with the railroad, and "as he failed to make payments of indebtedness as they became due his contracts to the land were subject to forfeiture at any time. The contracts were not put in evidence, and this is the only evidence we have of their provisions. Houghton and defendant went to the agent of the railroad company, and defendant's contract, at his instance was canceled, and a like contract made between the company and said Houghton. It was stipulated, so says Houghton, at the time that defendant should remain in possession of the land until Houghton should make sale of the land. He testified that nothing was there said about the growing crop of wheat on the ten acre piece. Afterwards, during negotiations with plaintiff or his agent for the sale of the land to him, he named to defendant that he would have to give up the land soon, when defendant informed him he claimed the wheat and would not surrender it; that defendant requested him in the sale to Towne to put in a certain tract of timber land held by defendant at a given price, and if he succeeded therein, the defendant would give up possession of the land. This was arranged, and the proceeds of this land paid over to defendant, amounting to about \$500. The sale of the land was made to Towne through the latter's brother as agent, and possession was to be given the first of May, 1878. This witness admitted, that when he met the plaintiff to transfer to him the contract with the railroad for the land they were informed by one Surle that defendant claimed the wheat, and was going to cut it. This wit-

ness also stated that, before he contracted with Towne, he asked the defendant to pay rent if he stayed on the place, but he refused. Kautz admitted in his testimony that he heard of defendant's claim to the wheat when they sold the timber land or shortly afterwards. Halstead also testified that "Moses Towne told us before the sale to plaintiff was complete, that Bowers claimed the land."

Defendant's evidence tended to show that when he and Houghton went to the railroad agent, the latter asked him if he had any objection to the company canceling the old contracts, to which he assented, and the arrangement was made as stated with Houghton; that defendant was to continue on the place and cultivate it until sold. This was in January. It was about the first of March that Houghton wanted defendant to pay rent, which was declined, because the agreement was that he was to occupy rent free. Before Towne bought, Moses, his brother and agent, came to see defendant about getting possession, when defendant told him he could have possession except the wheat, which he had sown and was going to cut. To which Towne made no objection. That when Houghton informed defendant of the proposed sale to Towne he advised him of his (defendant's) claim to the wheat, and that he would cut it; to which Houghton made no answer. Houghton stated to the witness Surle, before he sold the land to plaintiff, that defendant claimed the wheat, and there was no use to try to sell the land that year. The evidence quite clearly showed that when the writ of injunction was sued out and served the wheat was already cut and stacked on the ground. The court found the issues for the defendant and dissolved the injunction. The plaintiff brings the case here by appeal.

I. The view first entertained by us of this case was that, under the facts disclosed by the record, the action of injunction was misconceived, because at the time it was sued out the wheat was cut and stacked on the ground. Being severed from the soil it was then essentially personal property, and replevin it was thought was the appropriate



and effectual remedy. But on consideration, the court are of the opinion that under section 2722, Revised Statutes, the action of injunction may be resorted to, notwithstanding there may be an adequate remedy at law for the injury, in all cases where an adequate remedy cannot be afforded by an action for damages as such. Conceding this to be correct, it would still be an open question, under the facts of this case, where the party had entered and cut the wheat and left it stacked on the premises, whether injunction is maintainable. For now, as before the statute in question, injunction is a remedy to prevent threatened injury, and not for an act already accomplished. And unless it appeared that after the act of severance the wrong-doer is about to go further and remove the property from the premises to plaintiff's injury, the bill ought not to be maintained. No injury was occasioned to the crop by cutting and stacking it. It was an actual benefit to the plaintiff if he was the owner. But conceding that the purpose of the defendant to remove and convert it is sufficiently manifested by the act of cutting, we will determine the case on the issues considered by the circuit court.

II. The defendant being in possession under a contract of purchase from the railroad company, sowed this wheat in the fall of 1877. As such purchaser he had the right to do so. His right to continue in possession and gather the crop, as between him and his vendor, would depend upon the terms of the contract, and the action the vendor might see fit to take to oust the vendee before the maturity of the crop. The only evidence we have of the provisions of this contract is secondary, if not hearsay. It is contained in the statement of the witness Houghton, testifying on behalf of plaintiff, that "the land was subject to forfeiture at any time" by reason of failure to make payments thereon. When the imputed default occurred and whether it was such as would work a forfeiture of the growing crop, does not affirmatively appear and is left to implication, if not conjecture. The burden of proof rest-

ing upon the plaintiff no implication can be indulged in his favor, save such as arises from legal presumptions or the natural result of the facts proved.

Forfeitures are not the favorites of the courts. "The law will not imply them from slight circumstances, but they must be formally and clearly declared." *Cheny v. Bonnell*, 58 Ill. 271; *Froehlich v. Atlas Ins. Co.*, 47 Mo. 406. So much so is this the rule, that courts of equity never lend their aid to enforce a forfeiture, but will often relieve against them. *Messersmith v. Messersmith*, 22 Mo. 369. The remedy of the grantor for condition broken, is to enter, and when he cannot enter he must make a claim, and no one can make it for him, except the heir. *Jones v. St. L., K. C. & N. Ry Co.*, 70 Mo. 93, and authorities cited. It does not appear from the record that the vendor had taken any steps to enforce the alleged forfeiture, or was even complaining of the defendant's alleged delinquency. Under such circumstances it cannot be maintained that the defendant had forfeited his right to gather his crop, when the arrangement was entered into to turn over the contract to Houghton. See *Cheny v. Bonnell*, 58 Ill., *supra*. On the contrary the arrangement for the substitution of Houghton was not coerced, or even suggested by the railroad company, but was suggested by the defendant as a means of saving harmless his sureties bound for him on other debts. And it is noticeable that when the parties went to the railroad agent to effect the arrangement, as shown by defendant's testimony and not contradicted by the plaintiff, the agent inquired of the defendant if he had any objection to the cancellation of the contract, as if recognizing a subsisting right in the defendant to retain his contract. The plain common sense and equity of this transaction was, that the sureties would take the land for their protection, with the express agreement that the defendant would retain the possession and cultivate it until Houghton found a purchaser. Defendant testified that he was to so retain it, rent free. As proof that Houghton re-

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garded him as a tenant he afterward wanted him to pay rent. The authorities are quite uniform in holding that such a tenancy is one at will. Co. Litt., 68; *Rex v. Collett*, Russ. & Ry. 498; *Ellis v. Paige*, 1 Pick. 44; *Post v. Post*, 14 Barb. 253; *Harris v. Frink*, 40 N. Y. 32, and authorities cited

The plaintiff, as did Houghton, knew before he contracted for this land that the defendant claimed the wheat and intended to harvest it. The defendant so informed him through the agent Moses Towne, when he came to see him about getting possession in the event he bought of Houghton. He was distinctly told he could have the possession of the land, but the wheat was the defendant's, and that he would cut it. To this the plaintiff made no objection, and took a mere transfer of Houghton's contract with that understanding. Accordingly the defendant, on the 1st of May, surrendered the possession of the land. After the plaintiff thus obtained the possession to demand the wheat was a fraud on the defendant, which a court of equity will not promote. The fact that defendant, under such conditions, surrendered the possession did not militate against his right to return and gather the crop. *Stewart v. Doughty*, 9 John. 112. A tenant at will is entitled to emblements, and to that end the law gives him the right of egress and ingress to gather his crop. Co. Litt. 736. "It is without all question that the lessee shall have it (the crop) for by the same reason, that he shall have it when he is put out before it be ripe, he shall have it when he is put out when it is ripe. *Et ubi eadem est ratio, ibi idem jus.*" *Ib.* p. 740; 2 Flint. Real Prop., 216, 218; *Davis v. Thompson*, 13 Me. 215; *Sherburn v. Jones*, 20 Me. 70; Taylor L. & T., (7 Ed.) 534. This is always so when the landlord, by his act, terminates the tenancy.

It is suggested by appellant that, as emblements are given by the law to induce the tenant to properly cultivate the land, and not as a reward for labor already done in planting, the rule cannot be invoked in this case against

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the plaintiff, because the defendant planted before the relation of tenant between them attached. This is more specious than equitable or reasonable. Both plaintiff and his assignor, as already stated, were aware when they came voluntarily to deal with the land that the defendant, holding under the railroad company, had sown this wheat. They consented for him to hold his possession as a tenant at will while his crop was growing until the sale to plaintiff, or whoever bought, was completed, and with the distinct statement made by defendant that he claimed the wheat and would gather it. Without objection the plaintiff so obtained the possession of the premises. The reason of the rule invoked had not ceased to operate under such circumstances. At all events, equity in such a state of facts, will deny her courts to a party thus seeking to "gather where he has not sown."

The judgment of the circuit court is therefore affirmed. All concur.

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MOORE V. THE WABASH, ST. LOUIS & PACIFIC RAILWAY  
COMPANY, *Appellant*.

1. **Railroads: KILLING STOCK: STATEMENT.** A statement which alleges that the cow was killed at a point where there was no fence, and where by law the railroad company was bound to fence, and that by reason of such failure to fence the cow strayed upon the track and was killed, is sufficient.
2. ———: ———: **DAMAGES.** A railroad company, under the double damage act, (R. S. 1879, § 809,) is not liable to the owner of stock killed or injured on its track, unless it got upon the track at a place where the company is required by law to fence, regardless of where the stock may have been killed or injured.

*Appeal from Daviess Circuit Court.*—HON. J. C. HOWELL,  
Judge.

REVERSED.

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*Wells H. Blodgett and Geo. S. Grover* for appellant.

It does not appear from this record that the justice before whom the suit was brought, had any jurisdiction of the cause. If he had not jurisdiction none was conferred upon the circuit court by the appeal and trial *de novo* there. *State v. Metzger*, 26 Mo. 65; *Bersch v. Schneider*, 27 Mo. 101; *Webb v. Tweedie*, 30 Mo. 488; *Hansberger v. Railroad Co.*, 43 Mo. 196; *Iba v. Railroad Co.*, 45 Mo. 470; *Dillard v. Railroad Co.*, 58 Mo. 69; *Haggard v. Railroad Co.*, 63 Mo. 302. The complaint is fatally defective in not alleging that the cow got upon defendant's track at a point where there was no fence, as required by law, and was there killed in consequence of such failure to fence. *Johnson v. Railroad Co.*, 76 Mo. 553; *Nance v. Railroad Co.*, 79 Mo. 196. The admission of parol testimony to show that the townships of Benton and Grand River in Daviess county, Missouri, adjoined each other, was a fatal error. There was no such allegation in the complaint. *Buffington v. Railroad Co.*, 64 Mo. 246; *Waldheir v. Railroad Co.*, 71 Mo. 514; *Edens v. Railroad Co.*, 72 Mo. 212; *Price v. Railway Co.*, 72 Mo. 414; *Wayland v. Railway Co.*, 75 Mo. 556. The instruction given for plaintiff was erroneous. In the absence of an averment stating where the animal came upon the track, it was error to give this or any other instruction raising this issue, because it was nowhere averred in the statement. *Cecil v. Railroad Co.*, 47 Mo. 246; *Luckie v. Railroad Co.*, 67 Mo. 245; *Cunningham v. Railroad Co.*, 70 Mo. 202; *Johnson v. Railway Co.*, 76 Mo. 553; *Nance v. Railroad Co.*, 79 Mo. 196.

*Rush & Alexander* for respondent.

It is not necessary that the statement should show that the suit is brought in the township where the injury happened. It is sufficient if it appear somewhere in the proceedings. *Cummings v. Railway Co.*, 70 Mo. 571; *Barnett v. Railroad Co.*, 68 Mo. 57; *Iba v. Railroad Co.*, 45 Mo. 469;



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*Hansberger v. Railroad Co.*, 43 Mo. 196. It was unnecessary for the statement to show that suit was brought in an adjoining township to that in which the injury happened, but it may appear *aliunde*, and proof was offered to show that Benton and Grand River townships adjoined. But aside from such proof the court should take judicial notice of the relative position of the townships of Benton and Grand River. 1 Greenleaf on Ev., (13 Ed.) § 6; *Martin v. Martin*, 57 Me. 366; *Woods v. Henry*, 55 Mo. 560. Plaintiff's statement is sufficient to constitute a cause of action under section 809, article 2, chapter 21, Revised Statutes 1879. *Edwards v. Railroad Co.*, 74 Mo. 117; *Bowen v. Railroad Co.*, 75 Mo. 426; *Belcher v. Railway Co.*, 75 Mo. 514. And plaintiff's instruction, given by the court, correctly declared the law. *Lantz v. Railway Co.*, 54 Mo. 228.

EWING, C.—Suit was commenced by the respondent upon the following statement :

“ William H. More, plaintiff, against the Wabash, St. Louis & Pacific Railway Company, defendant.

“ Before Henry Ward, justice of the peace within and for Daviess county, Missouri. Plaintiff says that the defendant, at the time of the alleged injury hereinafter mentioned, was and still is a corporation, duly organized and doing business under and by virtue of the laws of Missouri. Plaintiff alleges that on the 14th day of December, A. D., 1880, the defendant did, by its agents, engines, cars and locomotives strike, wound, bruise and kill a cow, the property of the plaintiff of the value of \$35, at a point on its road in Grand River township, in Daviess county, Missouri, where there was no railroad, farm or public crossing and where the defendant's road was wholly unfenced, and passed through and along inclosed and cultivated fields, and where the defendant was, by virtue of the statute in such cases made and proved, to-wit: By section 809 of article (2) two of chapter (21) twenty-one, of the Revised Statutes of Missouri, entitled “ of private corporations,” bound to

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make, construct and maintain lawful fences and cattle-guards on or along the sides of its road. And plaintiff says that by reason of the failure of defendant to so construct and maintain said fences and cattle-guards, his cow strayed upon its road and was killed, and that by reason thereof he has been damaged in the sum of \$35.

"Wherefore plaintiff by virtue of said statute has the right to recover of defendant, and, therefore, prays judgment for double the amount of said damages, to-wit, seventy dollars (\$70)."

There was judgment before the justice for the plaintiff and an appeal to the circuit court, where there was again judgment for plaintiff, and the appellant brings the case here for review

I. It is insisted that the statement is not sufficient upon which to recover, in "not alleging that the cow got upon defendant's track at a point where there was no fence, as required by law, and was then killed, in consequence of such failure to fence. It is alleged that the animal was killed in consequence of such failure to fence, but where it got upon the track is not stated." We think this objection is not well taken. The statement, after alleging that the cow was killed at a point where there was no fence, and where by law the defendant was bound to fence, proceeds: "That by reason of the failure of defendant to so construct and maintain said fences \* \* \* his cow strayed upon its road and was killed," etc. This, we think, comes up to the necessary requirements. *Williams v. Mo. Pac. R'y Co.*, 74 Mo. 453; *Terry v. Mo. Pac. R'y Co.*, 77 Mo. 254; *Jackson v. Railroad Co.*, 80 Mo. 147; *Edwards v. K. C., St. J. & C. B. R. R. Co.*, 74 Mo. 117.

II. The court gave, at the request of plaintiff, the following instruction:

1. The plaintiff asks the court to instruct the jury that if they believe from the evidence, that on or about the 14th day of December, 1880, the defendant did by its agents, engines, and locomotives, strike and kill a cow, the property

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plaintiff, at a point on their road in Grand River township, in Daviess county, Missouri, where there was no public road or farm crossing, and where defendant's road was wholly unfenced, and where defendant's road passed through and along inclosed or cultivated fields, they must find for plaintiff and assess his damages at what they believe from the evidence was reasonable value of said cow.

This is objected to by the appellant. It is insisted that this instruction is erroneous, because the road is not liable unless the fences were defective at the place where the cow got on the track, and that it is immaterial where she was killed. This objection is well taken. It has been held by this court that it is the place where the animal got on the track, and not where it was killed that fixes the liability of the road. The instruction directs the jury to find for plaintiff, if the cow was killed at a place unfenced, etc.; it should have directed them that if she got on the track at a place where the road was not fenced, etc., and hence the instruction is defective and ought not to have been given. In *Nance v. St. L., I. M. & S. Ry Co.*, 79 Mo. 196, Judge Henry says: "The railroad company under the section upon which this action is based, is not liable to the owner of stock killed or injured, unless it *got upon the track* at a place where the company is, by law, required to fence, no matter at what place it may be killed or injured." *Cecil v. Railroad Co.*, 47 Mo. 246. For giving this instruction the judgment is reversed and the cause remanded. All concur.

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CLARKE, *Appellant*, v. THE INHABITANTS OF THE TOWN OF  
BROOKFIELD.

**Municipal Corporation: DEED TO ON CONDITION: REVERTER.** Where a municipal corporation acquires real estate upon a condition expressed in the deed of the grantor, that within five years it shall erect thereon a certain building proper for municipal purposes, and fails to comply with said condition by not erecting the structure, it

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must permit the land to return to the grantor, like any other owner of land on condition.

*Appeal from Linn Circuit Court.*—HON. G. D. BURGESS,  
Judge.

REVERSED.

*Huston & Brownlee* for appellant.

The terms of the deed create in form a valid condition subsequent. It declares a forfeiture and reverter. *Gilbert v. Peteler*, 38 N. Y. 168; *Lowe v. Hyde*, 39 Wis. 345; *Hayden v. Slaughter*, 5 Pick. 531; 2 Washburn on Real Prop., p. 3. The condition was not impossible at the time it was created. The impossibility to discharge a condition must be a physical one. 1 Swift, 93; 1 Hilliard on Real Prop., 309, note. The condition has not become impossible since its creation by the act of God or the grantor, nor has the condition been waived. The grantee cannot hold under the deed and at the same time repudiate it. *Parker v. Lincoln*, 12 Mass. 16; *Garret v. Scouten*, 3 Den. 334; *Cross v. Carson*, 8 Black 138; 1 Hilliard on Real Prop., 379. The grantor could impose his own conditions on the grant. The object expressed in the condition is a municipal one. *Chambers v. St. Louis*, 29 Mo. 572; *Ketchum v. Buffalo*, 14 N. Y. 356; *Allen v. Taunton*, 19 Pick. 488; *Hardy v. Waltham*, 3 Cush. 163; Dillon on Munic. Corp., § 432; Gen. St. 1865, p. 240. The power to provide a suitable town house is necessarily implied from the fundamental duties of a municipality. *Beaver Dam v. Frings*, 17 Wis. 409; *French v. Quincy*, 3 Allen 9; *Rayden v. Stoughton*, 5 Pick. 528; *Allen v. Taunton*, 19 Pick. 488; *Stetson v. Kempton*, 13 Mass. 278. The evidence showed that the grantor owned a costly hotel across the street from the land in question, and this fact was no doubt partly operative in inducing the conveyance by him to the city.

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*H. Lander* for respondent.

The clause in question in the deed from Clarke to the city, was not a condition subsequent. *Rawson v. Uxbridge*, 7 Allen 127; 2 Willard on Real Prop., p. 378; Bacon's Abridgment, Title "Conveyances;" Coke Litt., 203 a. b., 205 b.; 4 Kent's Com., pp. 229, 232; 2 Washburn Real Prop., p. 3; Shep. Touch., 123; *Parish v. Whiting*, 3 Gray 516; *Laberee v. Carlton*, 53 Me. 213. But conceding the clause in the deed to be a condition subsequent, it is void because the town had no power to erect the building mentioned therein. *St. Louis v. Clemens*, 43 Mo. 404; 1 Dillon Munic. Corp., § 55; *Ruggles v. St. Louis*, 43 Mo. 375; *Ketchum v. Buffalo*, 14 N. Y. 356. As between natural persons the acceptance of a deed with a condition binds the grantee as to the condition. *Newell v. Hill*, 2 Met. 180; *Goodwin v. Gilbert*, 9 Mass. 570; *Nugent v. Riley*, 1 Met. 117. But municipal corporations possess but limited powers to purchase, hold, use and dispose of real estate, and can so take, hold and dispose of such property only in the manner named in the charter. 2 Dillon Munic. Corp., (3 Ed.) §§ 562, 565; *Ketchum v. Buffalo*, 14 N. Y. 356, 360; *Reynolds v. Stark Co.*, 5 Ohio 204. The town could only bind itself within the limits of its charter powers by ordinance in conformity with its charter. *Leach v. Cargill*, 60 Mo. 317. And the town never assented to any condition in the deed, and is not, therefore, bound by it. *Thompson v. Boonville*, 61 Mo. 282; 1 Dillon Munic. Corp., (3 Ed.) § 455. The clause in the deed in question is void as tending to abridge and surrender the governmental powers of the town trustees. *Mathews v. Alexandria*, 60 Mo. 119; *Gale v. Kalamazoo*, 23 Mich. 344; *Melhan v. Sharp*, 27 N. Y. 622; *Webb v. Albertson*, 4 Barb. 51; *Palmer v. Plank Road Co.*, 11 N. Y. 376; 4 Kent Com., (11 Ed.) p. 142.

MARTIN, C.—This was an action of ejectment to recover possession of two lots of land in the town of Brook-



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field, which the plaintiff had conveyed to defendant, but which he claimed had reverted to him for breach of condition in the deed of conveyance.

It appears in evidence that on the 21st of October, 1871, the board of trustees adopted an ordinance which provided "for the borrowing of \$30,000 on bonds for the purpose of constructing an engine house and hall for the use and improvement of the town, and to purchase an engine and hose cart, hose and hook and ladders, and construct not less than three cisterns for the supply of the town with water for extinguishing fire." It was also ordered "that a committee be appointed to inquire the different prices of the different town lots for sale for the erection of a town hall." The committee appointed for that purpose reported four parcels of property as suitable for the building, along with the prices of each parcel. The plaintiff's lots were included in the report at the price of \$750. The minutes recite that, on motion of A. K. Lane, the plaintiff's proposition was accepted, and that the auditor was instructed to issue an order in favor of plaintiff in the sum of \$750. What the plaintiff's proposition was, does not expressly appear. But afterwards, on the 2nd of November, 1871, the board accepted a deed from the plaintiff for the lots in controversy, which contained the statutory covenants of grant, bargain and sale, as well as the covenant of warranty. It recited a consideration of \$750, "and other considerations herein named."

Immediately following a description of the lots and preceding the *habendum* clause is this condition, which gives rise to this suit. "In consideration of the following object and purpose, to-wit: and no other; the erecting thereon a suitable building for public purposes, and the improvement of said town, embracing suitable room for fire engine, hose, and apparatus for extinguishing fires, a public hall, and such other rooms in said building as may be deemed expedient for the public good by the board of trustees of said town. It is expressly understood and intended

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that said land herein described reverts to said Clark or his heirs, unless said building is constructed thereon within five years." On the next day, November 3, 1871, an injunction proceeding was commenced against the board of trustees for the purpose of restraining them from borrowing the funds, issuing the bonds, or in any manner carrying out the provisions of the ordinance. Due service of the suit was had. On the 6th of November, 1871, the board passed a resolution employing additional counsel to assist the city attorney in defense of the suit, and instructing the attorneys to take a change of venue from the court of common pleas in which the proceeding was instituted.

On the 9th of November, 1872, the board appointed a committee to confer with the parties who brought the suit in the the capacity of tax-payers, and submit to them a proposition, that the indebtedness to be incurred under the ordinance would be reduced to \$15,000, if they would withdraw their suit. The committee after conference, reported that they would do nothing. Upon reception of this report the trustees on the 11th of May, 1872, repealed the ordinance providing for the issue of bonds. After this repeal of the ordinance, the injunction suit was dismissed. It does not appear that any trial of the issues contained in it took place.

It also appears in evidence that the town of Brookfield from 1871 to 1876 had no more money in its treasury than was sufficient to pay current expenses, and the interest on its outstanding indebtedness; and that its warrants for money were generally under par value for want of funds in the treasury. Evidence was produced by plaintiff tending to prove that the lots at the time of the conveyance were worth from \$1,000 to \$1,500. Evidence of an adverse character was produced by defendant tending to depreciate their value. It was admitted at the trial that defendant had not erected any town hall or improvements of any kind on the lots; that defendant was in possession having enclosed them with a fence, and that plaintiff, be-

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fore suit, had made entry on the lots claiming them for condition broken. It was also admitted that at the time of the conveyance the plaintiff owned a large brick hotel, opposite the lots conveyed, worth \$25,000, besides other valuable real estate in the vicinity; that Brookfield was a town containing 2,500 or 3,000 inhabitants; that it has no public buildings for meetings of its board of trustees, for fire apparatus, or for keeping its records, and that since the conveyance, it has been paying from \$150 to \$200 annually for the rent of rooms for such purposes.

The trial was before the court without a jury. No instructions were asked or given. The court found the issues for the defendant and rendered judgment accordingly.

I have not deemed it necessary to recite the various defenses and pleas, some of which there was no evidence to support. It is sufficient, for the purposes of this appeal, to say that the pleadings for defendant were broad enough to admit the foregoing evidence, and that it is entitled to whatever advantage or benefit the evidence can afford it, either in law or in equity. The plaintiff's case was sufficiently put in issue by the answer in its various defenses. It also contained a prayer for relief from the supposed forfeiture, which was supported only by the evidence recited. The motion of plaintiff to set aside the finding and judgment of the court, alleges that upon the evidence judgment should have been rendered for plaintiff, and that the finding for defendant is against the law and evidence. The only point for us to consider is, whether the plaintiff, upon this evidence, could maintain his action of ejectment.

The form and import of the disputed clause in this deed place it within the well known classification of conditions subsequent. The condition of reverter is not left to be inferred from the use of certain words indicating further contingencies. The clause terminates with language expressly declaring a reverter. "It is expressly understood, and intended that said land herein described reverts to said Clarke or his heirs, unless said building is con-

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structed thereon within five years." Neither is it objectionable on the ground of any possible remoteness in the time limited for its fulfillment. The law governing this class of conditions seems to be well settled. If the condition is illegal, or is impossible from the beginning, or becomes impossible through the act of God or the act of the grantor, or inevitable accident, it will be held void or performance will be excused. Tiedeman on Real Prop., § 274; 2 Washburn Real Prop., (4 Ed.) 447, 448. If the condition is not open to the foregoing objections, then a breach of it works a forfeiture of the estate, which gives to the grantor or his heirs the option of claiming the estate, which is sufficiently expressed by entry or acts equivalent thereto. *Messersmith v. Messersmith*, 22 Mo. 369.

If this deed had been made to a private person, it would be difficult to invent any pretense against the legality, or reasonableness, of its condition, or the possibility of its performance. It requires the erection within five years of a building in Brookfield, on certain lots suitable for certain purposes. There is nothing in the character or costs of the structure, or uses to which it is to be adapted, which could render its erection illegal or impossible. Excuse from performance of the condition is rested by the learned counsel for defendant, upon the special character and powers of his client as a municipal corporation, which, it is argued, forbid and prohibit the erection of the structure called for. He also insists that the condition is void as an attempt to fetter and tie up the legislative discretion of the defendant, as a municipal corporation. I propose to consider these objections.

Unquestionably the plaintiff had the right to place his own price and terms of sale upon his lots. It is evident that he must have regarded the location of a town building so near his hotel and other property in the vicinity as an advantage and benefit to him, sufficient to represent a part of the consideration and terms of the sale. The precise terms of the proposition submitted and accepted, as re-

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cited in the minutes of the board do not appear except as inferred from the deed. But as the trustees accepted and paid him for his deed, it must be presumed, in the absence of proof to the contrary, that the conditions and terms of sale contained in it, corresponded with the proposition of sale submitted by him, and accepted by the board, otherwise the deed would have been rejected, as not being the one called for in the contract of sale. The defense that under the terms of sale the sum of \$750 was the full consideration for the conveyance, and that the plaintiff fraudulently combined with the trustees to incorporate the disputed condition in the deed, as an advantage and consideration to which he was not entitled by his contract of sale, is without a particle of evidence in its support.

The deed itself declares that there were other considerations besides the \$750; and a performance of the condition, which relates to the erection of the town building is, in its nature and terms, an additional consideration for the sale. *Bolling v. Petersburg*, 8 Leigh 224. The circumstances surrounding the transaction as disclosed in the evidence, *aliunde* the deed, as well as the deed itself, lead irresistibly to the conclusion that the principal inducement and consideration of the conveyance are contained in the condition relating to the contemplated erection of a town building. That such erection constituted a part of the consideration is a fact which the defendant is estopped from denying by the deed itself. A refusal on the part of the town to comply with the condition, is a refusal to pay or furnish a part of the consideration expressed in the deed, and evident character of the transaction. It is claimed that the town of Brookfield has no authority as a municipal corporation, under the statutes relating to town organizations to perform the condition. Without stopping to inquire whether this would be a valid defense to the claim of plaintiff for return of the lots, but only referring to authorities bearing upon the point, *Parker v. Lincoln*, 12 Mass. 17; *Garrett v. Scouten*, 3 Denio 334; *Cross v. Carson*,



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8 Black 138; 1 Illiard on R. Prop., 379, I am constrained to say that no want of authority has been made apparent in the argument submitted by defendant. It is declared in the statutes that the board of trustees "may purchase, hold and receive property, real and personal, within such town, and no other (burial grounds and cemeteries excepted) and may lease, sell and dispose of the same for the benefit of the town." They are also vested with the power "to prevent and extinguish fires," "to borrow money for the improvement of such town," "and to pass such other by-laws and ordinances for the regulation and police of such town and commons thereto appertaining as they shall deem necessary, not repugnant and contradictory to the laws of the land." General powers are given to them to appoint assessors, collectors, constables or marshals, treasurers "and such other officers, servants and agents as may be necessary; remove them from office, prescribe their duties, and fix their compensation." R. S. 1865, pp. 240, 241.

From these, as well as other, provisions of the statutes it will be seen that a vast number of powers and duties are imposed upon the trustees, which contemplate the various officers and departments of administration and business, incident to a complete and efficient municipal organization, having charge of and conducting its affairs for the benefit of the inhabitants. A building suitable for the accommodation of the town officers and records, and for the preservation of its necessary property, is a reasonable want, resulting from the fact of its corporate existence as a town. The right to erect such a structure is incidental to the powers expressly granted, or essential to carry out the objects of the corporation. *State ex rel. Jordan v. Haynes*, 72 Mo. 377. Accommodations of some sort for the departments of the town government must, at all times, be possessed and maintained, as disclosed in the evidence of this case. The board must have the lawful authority to erect suitable buildings for the conduct and transaction of its necessary affairs, on land which it is authorized to purchase, and hold for the

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benefit of the town, otherwise, it would be not only without the power to provide for its daily wants, but without the power incident to the proprietorship of realty, that is, of improving and devoting it to its own use and benefit. *Ketchum v. Buffalo*, 14 N. Y. 356; *Allen v. Taunton*, 19 Pick. 488; *Hardy v. Waltham*, 3 Met. 163; *Richardson v. Boston*, 24 How. 188; *Board, etc., St. Louis Public Schools v. Woods*, 77 Mo. 197.

The learned counsel of defendant criticises that part of the condition which requires the building to contain a "public hall," arguing that such a room could not be for the use or benefit of the town. It may be observed that the condition in the deed does not purport to contain the plans or specifications of the contemplated structure. The general character of the structure is indicated in the easy use of popular terms. The words "public" and "public good" obviously relate to the town or town benefit, which, as embracing the good of the inhabitants of a large town, is not improperly designated as "public" or "public good." A hall in which the trustees might find it proper to conduct their sessions in public, in which elections may be held, and where the inhabitants of the town may assemble to consider and discuss matters of public importance, would not, I conceive, be foreign to the uses and benefits to which the property of the corporation may be reasonably devoted. Accommodations of this character, such as Independence Hall and Fanniel Hall, are so familiarly associated with the early history of this nation, as nurseries of its infant liberty, that I am reluctant to believe that, in the course of a century, they have ceased to be in accord with the life and weal of American towns. Public halls and popular assemblies are out of place only in governments conducted by despots, where the people have no power and no voice. In a government where they have the right to assemble for the purpose of considering and discussing their public affairs, a convenient and commodious hall for them to assemble in,

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is, in my opinion, a proper and necessary want of the inhabitants of every town.

The objection that the town was not possessed of sufficient means wherewith to build the structure contemplated in the condition cannot afford it any relief from its operation. Even though it were a personal covenant, and not a mere condition attached to the land, pecuniary inability would constitute no excuse for failure to perform it. *Lewis v. Ins. Co.*, 61 Mo. 534. It may be remarked here that no particular cost or size of structure is called for in the condition. All matters of this kind were left to the discretion of the trustees. Neither is there any evidence that a tax for a reasonable fund to build a suitable structure would have exceeded the lawful limits of taxation. The evidence is simply that there was not enough money in the treasury for this expenditure. The plea of prohibition by injunction was not sustained. Only a temporary order was issued. There was no trial of the case, and no judgment remains to support the plea.

The argument that the condition is against public policy, as tending to fetter and abridge the legislative functions of the board, is made under a misapprehension of its import and terms. The condition is imposed by the grantor as an incident to his grant. It is attached to the land and follows it into the hands of every claimant. No personal obligation is imposed on the grantee. It is not as it might have been a covenant as well as a condition. *Stuyvesant v. New York*, 11 Paige 414. The trustees were not bound to build on these lots. Their legislative discretion when to build, what to build and where to build, remained unfettered as before the conveyance. If the public good required them to build elsewhere, or after the lapse of five years, they were at perfect liberty to do so by purchasing other land, or making new contracts to that effect. The only consequence which followed such change in the exercise of their discretion, was that these lots which they had acquired for the purpose of erecting the town building upon, reverted

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to the grantor after it was clear that the board did not want or intend to use them for that purpose.

The question, as to whether municipal corporations have the right to accept gifts or acquire property burdened with conditions which require them to do reasonable things germane to the objects of their existence, or return the gift or acquisition to the grantor or his heirs, is hardly to be considered an open question in this country, where so much property is constantly being received and held in this manner. *Baker v. St. Louis*, 7 Mo. App. 429; and 75 Mo. 671; *Stuyvesant v. New York*, 11 Paige 414.

The town of Brookfield having acquired these lots upon condition that it would erect the contemplated structure indicated in the deed of purchase, and having failed to comply with the condition by not erecting the structure, must permit the lots to return to the grantor, like any other owner of land held on condition.

As there is no evidence of rents or profits in the record I do not deem it necessary to order another trial. Accordingly the judgment is reversed and the cause remanded, with directions to enter judgment in favor of the plaintiff for recovery of the land described in the petition and for costs. All concur.

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THE STATE, *Appellant*, v. SEBASTIAN.

**Criminal Law:** STATUTE: PLEADING: INFORMATION. Where a statute makes it a misdemeanor to exhibit in a threatening manner certain specified weapons, or "other deadly weapons," it is not intended to declare that only those named are deadly weapons, and the only distinction made is, that in a prosecution under such statute for the exhibition of those specifically named, it is not necessary to allege that they are deadly weapons, whereas for any other it must be alleged and proved that it is a deadly weapon.

*Appeal from St. Francois Circuit Court.*—HON. W. N. NALLE,  
Judge.

REVERSED.

*D. H. McIntyre*, Attorney General, for the State.

It is obvious that the legislature never meant to enumerate all the weapons that might be regarded as deadly. A hatchet, an ax, a scythe and many other instruments might be used so as to become far more dangerous and deadly than a dagger or slung-shot, and it would be a question of fact for the jury as to whether a certain instrument used in a particular manner was a deadly weapon. *Doering v. State*, 49 Ind. 56; *Berry v. Comm.*, 10 Bush (Ky.) 15; *Hunt v. State*, 6 Tex. App. 664, and cases cited; *U. S. v. Small*, 2 Curtis 241. That the term "or other deadly weapon" means just what it says, and includes a hatchet, there can be no doubt. General words following particular ones are not always restricted to the particular. *Queen v. Edmunson*, 2 Ellis & Ellis (Q. B.) 75; *Queen v. Doubleday*, 3 Ellis & Ellis (Q. B.) 514; *State v. Hays*, 78 Mo. 600.

*Carter & Clark* for respondent.

HENRY, J.—At the May term, 1878, of the circuit court of St. Francois county, the defendant, upon the information of the prosecuting attorney, was charged with having exhibited a hatchet, a deadly weapon, in the presence of certain persons, in a rude and threatening manner. The court sustained a demurrer to the information, upon the ground that in the statute creating the offense a hatchet is not included among the deadly weapons named therein. The State has appealed.

The information was based upon the act of 1877, which is as follows: "Whoever shall, in the presence of one or more persons, exhibit any kind of fire-arms, bowie-knife,



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dirk, dagger, slung-shot, or other deadly weapon, in a rude, angry or threatening manner, not in the necessary defense of his person, family or property," etc. Laws 1877, p. 240.

Fire-arms, bowie-knife, dirk, dagger and slung-shot are expressly mentioned, but if the exhibition of no other deadly weapon in a rude, angry or threatening manner is a misdemeanor, the words, "or other deadly weapon," following the specific mention of those weapons are surplusage. Certainly, it was not the intention of the legislature to declare that only the specified deadly weapons are such. The statute declares them to be deadly weapons, and the only distinction recognized in the section between them and other deadly weapons, is, that the exhibition of those named in the manner specified, is a misdemeanor, and it is unnecessary to allege that they are deadly weapons, whereas as to other weapons exhibited, it must be averred and proved that they are deadly weapons.

Judgment reversed and cause remanded. All concur.

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O'SHEA *et al.* v. PAYNE, *Appellant.*

**Homestead Exemption:** PRE-EXISTING DEBT. A homestead is not exempt from execution for a debt created before its acquisition, whether the debt was created in this State or elsewhere. And the date of the filing of the deed will be held to be the time when the homestead was acquired.

*Appeal from Jackson Circuit Court.*—HON. S. H. WOODSON,  
Judge.

**AFFIRMED.**

*Frank Titus* for appellant.

(1) The action of plaintiff was not maintainable on a foreign judgment in attachment. Freeman on Judg., § 436. (2) The cause of action, whatever it may have orig-

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inally been, was merged in the judgment obtained in Kansas. That judgment thenceforward became the cause of action as against Payne, and in favor of O'Shea. Freeman on Judg., (3 Ed.) §§ 215, 216, 217. But such cause of action had no existence in this State until action was brought on it and service had. Action on the judgment was begun March 23rd, 1880, and judgment had April 7th, 1880. The homestead deed was filed March 1st, 1880, and no cause of action existed then which would debar defendant from the exemption provided by law, otherwise judgments obtained in other states would have extra-territorial force and be binding upon the lands of this State before action brought thereon or judgment rendered. The homestead exemption is in derogation of no right; is beneficent, liberal and wise. *State ex rel. v. Diveling*, 66 Mo. 375. And these statutes "should have a liberal interpretation to accomplish the object of the law." The defendant had a right to disclose by evidence the facts entitling him to have the execution quashed. *Pratt v. Canfield*, 67 Mo. 48. The judgment refusing to quash the execution, is a final judgment, from which an appeal lies. *James v. Ray*, 59 Mo. 280. (3) The evidence showed the land levied on to be the homestead of defendant, upon which he lived as the head of a family, and that it did not exceed the statutory dimensions or the statutory value.

*Dunlap & Freeman* for respondent.

(1) This cause of action has existed ever since 1876. Payne's deed to the property claimed as exempt, was filed March 1st, 1880. The statute and these dates ought to be conclusive upon this question in view of the decisions which fully sustain a literal construction of the statute. R. S. 1879, § 2695; *Shindler v. Givens*, 63 Mo. 394; *Farra v. Quigley*, 57 Mo. 284; *Stivers v. Home*, 62 Mo. 473; *Lincoln v. Rowe*, 64 Mo. 138. (2) This cause of action is and always has been a cause of action in this State. But if it were a

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cause of action existing in another state prior to March 1st, 1880, (the date of the filing of defendant's deed to the property in controversy,) this property would be subject to its payment in the same manner as if it were a Missouri debt. *Lang v. Cunningham*, 17 Ia. 510; *Brainard v. Van Kuran*, 22 Ia. 261. (3) This debt has never been changed since 1876, when it was created, so as to make it "a new debt" in the sense, that the date of the cause of action should commence from the date of the change of the form of debt for the purpose of homestead exemption. *Thompson on Homestead*, § 311, notes 1 and 2; *Woodline v. Towles*, 9 Baxter, (Tenn.) 592. The same rule of construction applies where the debt has been converted into a judgment. *Thompson on Homestead*, § 312; *Wills v. Spaulding*, 50 Me. 57; *Reed v. Defebaugh*, 24 Pa. St. 495; *Weaver's Estate*, 25 Pa. St. 434. (4) Defendant had the right to introduce evidence to show the execution was improperly issued. Yet he had no right to introduce evidence to show that the court in Kansas rendering judgment, had not allowed proper set-offs.

SHERWOOD, J.—This cause comes here on the appeal of the defendant, based on the refusal of the court below to quash an execution issued in the cause, and levied upon certain real estate claimed by the defendant as his homestead. The quantity of land did not exceed that exempted by law, and the deed whereby the defendant acquired the land was filed for record March 1st, 1880. The judgment on which the execution, in question was based, was rendered before a justice of the peace of Jackson county, Missouri, on service of ordinary process, April 7th, 1880, and this judgment, as was proved and admitted on the hearing of the motion to quash, was founded on a judgment rendered in a district court of the state of Kansas, July 18th, 1877. This judgment as the record shows, was a *general* judgment, the parties appearing and going to trial. The justice of the peace before whom the judgment first afore-

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said was rendered, issued execution which was duly returned at the proper time unsatisfied, etc., and thereupon a transcript was filed by the justice, and on this the execution moved to be quashed, was issued on November, 26th, 1880.

Under the ruling in *Shindler v. Givens*, 63 Mo. 394, and *Lincoln v. Rowe*, 64 Mo. 138, and other cases decided by this court, the date of filing the deed by the defendant, March 1st, 1880, was the date of the acquisition of whatever homestead rights he possessed, and could not prevail against a pre-existing debt.

It does not appear where the cause of action arose, nor when it arose; it certainly had existence prior to the rendition of the judgment in 1877. And, if this was the case, it is wholly immaterial where the cause of action arose, whether in this State or elsewhere. The statute, by which this cause is controlled, makes no distinction as to the *locus in quo* of the debt or cause of action, and gives no preference or vantage ground to home creditors, over those from other states or countries. This is the view taken of this point in Iowa. *Laing v. Cunningham*, 17 Iowa 510; *Brainard v. Van Kuran*, 22 Iowa 261. The judgment should be affirmed. All concur.

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THE STATE *ex rel.* ELLISON, *Collector*, Appellant, v. PILAND.

**Limitations, Statute of:** BACK TAXES. The statute of limitations does not run against a demand of the State for delinquent taxes.

*Appeal from Ozark Circuit Court.*—HON. J. R. WOODSIDE,  
Judge.

REVERSED.

W. J. Orr for appellant.

The statute of limitations does not run against the

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State in a suit for the collection of back taxes. *State ex rel. v. Heman*, 70 Mo. 441; *City of Jefferson v. Whipple*, 71 Mo. 519.

*Livingston & McClendon* for respondent.

NORTON, J.—This suit was instituted in the circuit court of Ozark county, on the 5th day of January, 1881, to recover and enforce the lien of the state for back taxes for the years 1873, 1874 and 1875, on certain lands in the petition described, aggregating the sum of \$120.51. The petition was demurred to on the ground that plaintiff's action was barred by the statute of limitations. The court sustained the demurrer, dismissed the suit, and adjudged the costs against plaintiff, and from this judgment the state appeals.

The action of the court in sustaining the demurrer was erroneous. In the cases of the *State to use of Rosenblatt v. Heman*, 70 Mo. 441 and *City of Jefferson v. Whipple*, 71 Mo. 519, it was held that the statutes of limitations does not run against a demand of the State for taxes. Section 3253 of Revised Statutes which provides that "the limitations prescribed in this chapter shall apply to actions brought in the name of this State, or for its benefit, in the same manner as to actions by private parties," does not apply to suits brought for taxes inasmuch as section 6846 of the revenue law, in express terms, declares that the "provisions of said section 3253 shall not apply to actions brought by the State under the revenue law."

Judgment reversed and cause remanded, in which all concur.



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Kendrick v. The Chicago & Alton Railroad Company.

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KENDRICK V. THE CHICAGO & ALTON RAILROAD COMPANY,  
*Appellant.*

1. **Railroads: KILLING STOCK: FAILURE TO RING BELL AT PUBLIC CROSSING.** In an action founded on Revised Statutes, section 806, against a railroad for killing plaintiff's hog at a public crossing, caused by neglect to ring the bell or to blow the whistle of its locomotive, it not appearing that the hog was fettered or hindered so as to prevent its escape from the track had the signals been given, it is proper for the trial court to instruct the jury to find whether the killing was caused by the alleged neglect to give the signals.
2. **Verdict: NO EVIDENCE TO SUPPORT.** Where there is no evidence to support a verdict, returned by the jury, on a count in the petition for the negligent killing of one of plaintiff's hogs, the judgment will be reversed as to such count.
3. **Negligence: PLEADING: MISJOINDER.** A common law action for negligence cannot be joined in the same count with one for statutory negligence.

*Appeal from Saline Circuit Court.*—HON. WM. T. WOOD,  
Judge.

REVERSED.

*Macfarlane & Trimble* for appellant.

The burden of proof was on plaintiff to show, that the killing of the hogs was caused by failure to give the signals, or that it was negligence to permit wheat to be scattered on the track and that such negligence was the proximate cause of the damage. Neither was shown and defendant's instruction that the verdict should be for defendant on the first count should have been given. *Holman v. Railroad Co.*, 62 Mo. 562; *Alexander v. Railroad Co.*, 76 Mo. 494. There were two, if any, causes of action shown by the evidence. The two hogs were killed on different days and constituted two distinct causes of action, and could not be joined in the same count of the statement, and the verdict could only have been for the value of one of the hogs. All testimony in reference to the other

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should have been excluded. On the second count the statement was fatally defective. It fails to show that the hogs got on defendant's track and were killed at a place where defendant was required by law to maintain fences. And it fails to show that the injury to the hogs was the result of the failure to fence. Defendant's objections to all testimony and its motion in arrest of judgment should have been sustained. *Schulte v. Railroad Co.*, 76 Mo. 324; *Rowland v. Railroad Co.*, 73 Mo. 619. This count is for double damages under the 43rd section of the railroad act, but the statement shows that the hogs were tolled on the track by scattered wheat. Who did the tolling is not shown, but if any reason for the killing is shown, it is that the hogs were tolled on the track. The 43rd section does not make this negligence, for which either simple or double damages can be recovered. The defective statement is not cured by the evidence. It did not appear how long the fence had been out of repair. *Clardy v. Railroad Co.*, 73 Mo., 576.

*S. B. Burks* for respondent.

PHILIPS, C.—This is an action begun in a justice's court for the recovery of damages for killing stock on defendant's railway track. The statement contains two counts. The first count is based on section 806 Revised Statutes. The second count is based on section 809 of said statutes. Each action is for killing hogs. Judgment in the justice's court for plaintiff on both counts, with like result in the circuit court, to which defendant took the case on appeal. From this judgment of the circuit court the defendant prosecutes this appeal.

I. The first count alleges the killing of two hogs at a point on defendant's road where the same crosses a public road. The negligence imputed to defendant was a failure to either ring the bell or sound the whistle, as required by the statute. As to one of the hogs the evidence quite satis-

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factorily showed that it was killed by defendant's train of cars at such crossing, and that defendant failed to give either of the required signals at the place and time. The hog was in no wise fettered or hindered, so as to have prevented its escape from the track, had the signal been given, nor was there anything, so far as the evidence discloses, to obstruct the view of the hog or the engineer in charge of the locomotive.

The instruction given by the court touching this issue, very properly and pointedly required the jury to find that the injury to the hog was caused by the neglect of the defendant to ring the bell, or to sound the whistle. This was, as we think, all the statute requires. *Alexander v. R. R. Co.*, 76 494; *Turner v. R. R. Co.*, 78 Mo. 578. It is true there was evidence *pro* and *con*, as to whether the sounding of the whistle or the ringing of the bell would likely have attracted the attention of the hog and caused it to have moved from the track. But this evidence was incompetent and immaterial. The legislature has imposed this duty on the railroad companies, presumably because the known tendency of such noise is to frighten stock away, and the statute should stand for a reason. *Turner v. R. R. Co.*, *supra*.

As to the second hog killed, the evidence shows that it was found dead at the said road crossing, but at a day different from the killing of the first named hog. No one saw it killed, nor was there any evidence of a failure on the part of defendant to sound either the whistle or ring the bell. There was, therefore, no evidence whatever to support the verdict returned by the jury for this hog; and the judgment on this count should be reversed for this error. As the case is to be remanded, it is, proper to say, that in both counts of the statement there is an averment that wheat was scattered along the road bed at the point where the hogs were killed. These allegations should be either stricken out or treated as mere surplusage, and no evidence admitted thereon. Any cause of action arising on such

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fact would be but a common law action for negligence. The present action is confessedly founded on the statute, above named, with which such common law action cannot be joined in the same count.

II. As the cause is to be reversed, the objection made to the second count of the statement can be obviated by an amendment. The statement as it is would, perhaps, be sufficient after verdict, under the recent decisions of this court; but the plaintiff would do well to amend by averring that defendant was required by the said section of the statute (43 §, Wag. Stat. p. 310) to erect and maintain a good and substantial fence along, etc., the sides of its road, at the point where said hogs got upon the track, etc. The statement should also be amended by omitting the allegation touching the strewing of wheat along the road.

The judgment of the circuit court is reversed and the cause remanded. All concur.

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FLETCHER, *Appellant*, v. WEAR, *Administrator of Donnelly*,  
*Garnishee*.

1. **Garnishment: SERVICE OF PROCESS.** A justice of the peace is not empowered to appoint any one to serve the extraordinary process of attachment by garnishment, and credits in the garnishee's hands cannot be legally attached by the use of such process.
2. ———: ———. In the absence of a declaration of attachment by the sheriff or constable serving the writ, a garnishee can confer no jurisdiction upon a justice of the peace to make an order of delivery or of payment, which will bind the property or credits of the debtor in his hands, and when, at any time, such want of jurisdiction appears, the garnishee should be discharged.
3. ———: ———: **ESTOPPEL.** A garnishee may, by his negligence in pleading, or by consent, expressed or implied, invite or permit an order of delivery or payment which will be binding upon himself, while it fails to bind any one else, or any other's property. But, an order binding on the garnishee alone would constitute no protection

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against a second payment of the same credits by him, and courts should avoid this hardship by discharging the garnishee while they have control of the proceeding.

*Appeal from Jefferson Circuit Court.*—HON. L. F. DINNING,  
Judge.

AFFIRMED.

W. H. H. Thomas for appellant.

(1) A justice of the peace has authority to appoint a special deputy under section 2862, Revised Statutes 1879, to execute a writ of attachment. A writ of attachment is "process" authorized by article 3, chapter 44, Revised Statutes 1879, section 2849. Drake on Attachments, § 186; *Benton v. Wilkinson*, 18 Ver. 186. (2) The service of garnishment in this case was sufficient to give the justice jurisdiction to proceed to hear and determine the issues and render judgment. R. S. 1879, § 2520; *Quarles v. Porter*, 12 Mo. 49. (3) If, however, the execution of the writ of attachment by a special constable was irregular, the appearance before the justice on the return day of the writ, of plaintiff, defendant and the garnishee, and the trial of the case on its merits, in which all parties participated, cured the irregularity. Drake on Attachments, §§ 36, 112, 144, 114; *Smith v. Chapman*, 6 Porter (Ala.) 365; *Gould v. Meyer*, 36 Ala. 565, and cases cited; *Bank v. Titsworth*, 73 Ill. 591; *Smith v. Monks*, 55 Mo. 106; *Reppstein v. Ins. Co.*, 57 Mo. 86; *Henderson v. Droce*, 30 Mo. 358. (4) No written interrogatories to the garnishee are required before justices of the peace in garnishment proceedings. R. S. 1879, § 2543; *Laughlin v. January*, 59 Mo. 383.

Williams & Green for respondent.

In this case there was neither a return, showing anything attached in the garnishee's hands, nor any officer who could have served a notice of garnishment or made a re-



turn. The justice, therefore, plainly obtained no jurisdiction, and the case was, for that reason, properly dismissed by the circuit court. R. S. 1879, § 420, subdivisions 4 and 5, and §§ 2520, 2529; *Norvell v. Porter*, 62 Mo. 309; *Drake on Attachment*, (5 Ed.) §§ 451 b, 451 d, 452, 453.

MARTIN, C.—This suit was originally instituted before a justice of the peace by attachment. The writ of attachment was issued on the 10th day of February, 1880; and J. O. French, the justice before whom the suit was instituted, indorsed on said writ the following: "At the request and risk of the plaintiff, I authorize Chas. T. Rankin to execute and return this writ. J. O. French, Justice of the Peace." Said Rankin made the following return: "Executed this writ by delivering the same to Albert M. Baker, which he read in my presence on the 11th day of February, 1880, and by attaching the following goods and chattels of the defendant \* \* and by delivering to Eugene J. Donnelly and William Blank, on the tenth day of February, A. D. 1880. That I did summon them, as garnishees, to appear before the within named justice, at his office, on the return day of this writ, to answer such interrogatories as may be put to them by said justice, and by reading to them this writ of attachment." And at the same time, said Rankin delivered to said Donnelly, a summons, as follows:

"Charles C. Fletcher, plaintiff, against Albert M. Baker, defendant.

"Before J. O. French, Justice of the Peace.

"The State of Missouri, to Eugene J. Donnelly and Wm. Blank, greeting:

"You are hereby summoned as garnishees, to appear before J. O. French, justice of the peace of Valle Township, in Jefferson County Missouri, at his office, in said township, on the 20th day of February, 1880, at 10 o'clock a. m., to answer such interrogatories as may be exhibited against you touching your indebtedness to the above

named defendant, Albert M. Baker, and your possession or control of money, property or effects, belonging to Albert M. Baker."

On February 20, 1880, French, on application of Baker, granted a change of venue to B. S. Reppy, justice of the peace. The papers were handed over to Reppy, and on the same day plaintiff and defendant appeared before the latter justice, and waived notice, etc. Defendant, Baker, filed his plea in abatement, denying the causes of attachment set up by plaintiff. A trial was thereupon had of the issue raised by that plea, and that issue was found by a jury, for the plaintiff, and judgment was thereupon rendered against defendant for \$149. On the same day E. J. Donnelly appeared before said justice and made answer to interrogatories propounded to him, and stated that he owed defendant \$114.39, and judgment was thereupon rendered against him as garnishee for that amount. Defendant, Baker, then, on the same day, filed before said justice, his motion asking the justice to allow him the amount due by Donnelly to him, as exempt from attachment. In this motion he states: "Now, at this day, comes defendant, and states that Eugene J. Donnelly is indebted to him in the sum of \$113.64, and that said sum has been garnished at the instance and suit of the above named plaintiff, by virtue of the writ of attachment in this cause." The justice overruled this application, and defendant retired from the contest, and has not appealed. The garnishee, Donnelly, made no objection to any of the proceedings on the day of trial, but on March 1, 1880, eight days after the trial, and in absence of plaintiff, he filed his motion to set aside the judgment rendered against him on February 20, 1880, which he called a judgment by default, for the following reasons: "1st.—Because the justice had no jurisdiction of the person of said defendant in said cause, or of the subject-matter, and no power to render any judgment against defendant. 2nd.—Because said Donnelly was not, prior to rendition of said

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judgment, or at any time, garnished in said cause, so that said judgment against him is void."

This motion was overruled and Donnelly appealed the case to the circuit court. When the case reached that court, Donnelly filed his motion to dismiss the cause of action, setting up substantially that a special constable could not execute a writ of attachment, and that Donnelly had not been properly summoned as garnishee, and that the credits of defendant, Baker, had not been attached in his hands, and that no written interrogatories had been filed before the justice. This motion was sustained by the court, and plaintiff duly excepted at the time. Plaintiff then filed his motion to have the judgment of the court dismissing his cause of action set aside, and to re-try the same, which was by the court overruled; to which action of the court, plaintiff at the time excepted, and brings the case to this court by appeal.

By section 2862, Article III, Chapter 44 of the Revised Statutes, a justice of the peace is empowered to appoint any suitable person, not a party to the suit, to execute any process "authorized by this article." R. S. 1879, § 2862. This may be done when he is satisfied that such process will not be executed for want of an officer to be had in time to execute the same. The appointment is to be evidenced by an indorsement to that effect on the process itself. It has been held that this section does not apply to suits of replevin, or to final process on execution, but only to ordinary process. *Henoch v. Chaney*, 61 Mo. 129; *Huff v. Alsop*, 64 Mo. 51. Process by attachment is not authorized by article 3, although in section 2849 it is alluded to as one of the forms in which actions may be instituted before justices of the peace. The authority for issuing the writ is not derived from this article, but from Article 2, Chap. 6, which prescribes the affidavit and writ, and method of service thereof as prevailing before justices of the peace. R. S. 1879, §§ 464 to 481. Article 3 of Chapter 44 prescribes only the form and method of service

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of ordinary process by summons, and it is in connection with such process that the justice is empowered to appoint some suitable person to perform the duties of constable. The service of a writ of attachment by garnishment process is not provided for in Article 3 of Chapter 44, but is found elsewhere. R. S. 1879, §§ 420 to 481.

Under the decisions cited, I do not think the justice was empowered to appoint any one to serve the extraordinary process of attachment by garnishment. From this, it follows that there was no service of the process at all, and that the credit in the garnishee's hands was never legally attached by virtue of the process used by plaintiff. Notwithstanding this the garnishee stood up in court, as if legally garnished, and made answer to the interrogatories propounded to him, without objecting to the manifest want of jurisdiction in the court to go on in the proceeding. By thus not objecting until the case was being tried *de novo* in the circuit court was he estopped from making the objection there and before final judgment? This is the question for us to determine.

Attachment proceedings before justices are required to conform with proceedings in the circuit court as near as possible, unless otherwise ordered. R. S. 1879, § 481. Under the 2nd, 4th and 5th sub-divisions of section 420, relating to garnishees, it will be observed that two distinct steps are required to be taken by the officer in the service of garnishment. R. S. 1879, § 420. In respect to goods and chattels of the attachment debtor, he is required to seize them if accessible; "and if not accessible, he shall declare to the person in possession thereof, that he attaches the same in his hands, and summon such person as garnishee." In respect to credits of the defendant, he "shall declare to the debtor of the defendant, that he attaches in his hands all debts due from him to the defendant, or so much thereof as shall be sufficient to satisfy the debt and interest, or damages and cost, and summon such debtor as garnishee." The form of the summons is indi-

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cated in the second sub-division of the same section. One of the steps in this process is a declaration of attachment of the property or credits of the attachment debtor in the possession of, or owing to him by the garnishee. The other is in the nature of an ordinary summons to the garnishee to come into court, at the next term, and make answer to interrogatories of the plaintiff relating to the property or credits attached. The proceeding is somewhat akin to a proceeding *in rem* the object of which is to effect, as it were, a sequestration of the property and credits of the attachment debtor, to the end that they may be ultimately applied towards satisfaction of the plaintiff's claim or demand by the order and final judgment of the court. R. S. 1879, §§ 2550, 2551.

The notice, or declaration of sequestration to the garnishee, takes the place of a manual seizure, which is impossible on account of the inaccessibility of the chattels, and the intangibility of the credits. It is this constructive seizure, which brings the *res* within the jurisdiction of the court, and thereby enables it to make binding orders in relation to it, which shall be obligatory on the owner of it, and furnish a protection to the possessor or custodian of it, as against the claim of the owner for it. Such property or credits do not belong to the garnishee. He is a mere possessor or custodian thereof for the owner, and on that account he is unable to confer upon the court any authority to dispose of them. That authority must come either from the owner's consent, or from the process provided by law, which enables the court to dispose of his property and credits without his consent. The garnishee cannot supply or waive the declaration of attachment, which constitutes the equitable sequestration of the property and credits of the attachment debtor. So far as the personal summons on the garnishee is concerned, I see no reason why he should not be at liberty to waive service thereof as in any ordinary process. Neither do I perceive why his appearance should not estop him as in any ordinary suit from denying service



of the summons. But neither express consent, or implied waiver from him, can be allowed to take the place of the constructive seizure of another person's property, which gives rise to an equitable lien upon it from the date thereof, against the will of the owner. It must be apparent that a waiver of such process cannot be placed upon the same footing with the waiver of service of ordinary process, which is directed only against the defendant and property which is exclusively his.

The garnishee in this case, in absence of a declaration of attachment by the sheriff or constable serving the writ, could confer no rightful jurisdiction upon the justice to make an order of delivery or of payment, which should bind the property or credits of the debtor in his hands. And no court entertaining the proceeding, would be justified in making such order, if, at any time during the progress of it, it became apparent that the necessary step which authorizes the rightful exercise of such jurisdiction was wanting. After the appeal from the justice and when the case came up for trial *de novo*, the manifest want of jurisdiction was brought to the attention of the court, and upon this showing the garnishee was very properly discharged. The ultimate object of the proceeding being to obtain an order of delivery, or payment binding upon the property or credits of the attachment debtor, it was properly dismissed as soon as it became apparent that no such order could be obtained. This conclusion is supported by the authorities in this State. *Malsby v. Farr*, 3 Mo. 430; *Southern Bank v. McDonald*, 46 Mo. 31; *Norvell v. Porter*, 62 Mo. 309; *Haley v. H. & St. J. R. R. Co.*, 80 Mo. 112; *Epstein v. Salorgne*, 6 Mo. App. 352.

In this connection, I may add that I do not pretend to controvert the doctrine asserted in many cases, that a garnishee may by his negligence in pleading, or by consent expressed or implied, invite or permit an order of delivery or payment, which shall be binding on himself, while it constitutes no protection against the claims of his creditor

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in thus obeying it. Being personally before the court, he may well be estopped from denying the validity of an order, so far as he is concerned, which he has invited by his negligence or confession. An order or judgment, operating on the defendant in *personam*, may be binding on him, while it fails to bind any one else or any other one's property. *Gould v. Meyer*, 36 Ala. 565; *Nat. B'k v. Tiltworth*, 73 Ill. 591; *Wellover v. Soule*, 30 Mich. 481; *Johnson v. Dexter*, 38 Mich. 695; *Curry v. Woodward*, 50 Ala. 258. But as the sole object of the proceeding in garnishment is to obtain an order binding on the property and credits of the attachment debtor, and not to collect the plaintiff's demand from the garnishee, who owes him nothing whatever, the misfortune of the proceeding resulting in an order or judgment binding on the garnishee alone, which will constitute no protection against a second payment of the same credits, ought to be avoided by the courts, if they can do so while they have control of the proceedings.

It was so avoided in this case, and the action of the court in this respect should be affirmed, and it is so ordered. All concur.

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STONEBRAKER *et al.* v. FORD *et al.*, *Plaintiffs in Error*.

1. **Mortgage to Indemnify Sureties:** WHEN LATTER ENTITLED TO MORTGAGED PROPERTY. Where a mortgage is given to indemnify the mortgagees against loss as sureties of the mortgageor, the sureties, in the absence of a provision in the mortgage authorizing it, are not entitled to possession of the mortgaged property until they have paid the mortgage debt or some part of it.
2. **Mortgage;** DESCRIPTION OF PROPERTY CONVEYED. Where the recording of a mortgage, as under our statute, takes the place of the actual delivery of the mortgaged property, the mortgage to be effectual, must point out the subject matter of it so that a third person by its aid, together with the aid of such inquiries as the instrument itself suggests, may identify the property conveyed.

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3. ———: ———. A mortgage described the property therein conveyed as "forty head of cattle of different ages and sexes, most of them thoroughbreds," and as being on the mortgageor's farm in Pike county. The evidence showed that at the time of the execution of the mortgage, the mortgageor had "forty-five or forty-six head of cattle on his farm of different ages and sizes." The mortgagees brought replevin for sixteen head of said cattle describing them in the petition as "sixteen head of thoroughbred aged cattle;" *Held*, that as to the cattle involved in suit, the mortgage was inoperative, because they were insufficiently described therein.

*Error to Louisiana Common Pleas Court.*—HON. G. PORTER,  
Judge.

REVERSED.

W. H. Biggs for plaintiffs in error.

The court committed error in permitting the defendants in error to read the chattel mortgage in evidence. 1st. Because the description of the debt attempted to be secured by the mortgage was too vague and indefinite. *Rood v. Welch*, 28 Conn. 157, and authorities cited. 2d. Because the description of the property attempted to be transferred by the mortgage is so vague, indefinite and uncertain as to render the instrument void. *Golden v. Cockrell*, 1 Kas. 259; *Richardson v. Alpina Lumber Co.*, 40 Mich. 203; *Crosswell v. Allis*, 25 Conn. 301; *Bullock v. Williams*, 16 Pick (Mass.) 33; *Kelley v. Reid*, 57 Miss.; *Fowler v. Hunt*, 48 Wis. 345; *Jones Chat. Mort.*, § 56; *Herman Chat. Mort.*, §§ 38, 42. 3d. Because the evidence of defendants in error shows that the mortgage was in point of fact given to secure the defendants in error as endorsers for John E. Stonebraker to one William C. Prewitt. The testimony of Alfred and John E. Stonebraker shows that plaintiffs in error did not sign the Prewitt note. 4th. Because the defendants failed to show by their testimony that the property involved was a portion of the identical property described in the mortgage. 5th. The chattel mortgage was void as to the cattle and sheep, because John

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L. Stonebraker testified that at the time the mortgage was given he had forty-five or forty-six head of cattle on his farm in Pike county, and that he also had thirty-three head of imported Cotswold sheep on his farm. John E. Stonebraker by the mortgage attempts to sell or transfer to the mortgagees "forty head of cattle of different ages, sizes, etc., and twenty head of imported Cotswold sheep then on his farm in Pike county, Missouri." There is no pretense that forty head of cattle and twenty head of imported Cotswold sheep were separated from the other cattle and sheep at the time the mortgage was given, nor is there anything in the testimony tending to prove which forty head of cattle out of the lot of forty-six, or which twenty head of imported Cotswold sheep out of the lot of thirty-three head were intended to be conveyed or transferred to the defendants in error by the mortgage. *Blakely v. Patrick*, 67 N. C. 40; 12 Am. R. 600; *Waldo v. Belcher*, 11 Ired. (N. C.) 609; *Jones v. Morris*, 7 Ired. (N. C.) 370; *White v. Wilks*, 5 Taunton 176. The court should have given instruction No. 1 asked by plaintiffs in error. Authorities last cited. Instruction No. 2, asked by plaintiffs and refused by the court, should have been given. *Burgert v. Borchert*, 59 Mo. 80.

*Champ Clark* for defendant in error.

(1) The law, as applicable to the case, was properly declared in the instructions given for the defendants in error. *Durkee v. Chambers*, 57 Mo. 575; *Kuykendall v. McDonald*, 15 Mo. 416, 420; *Shelly v. Boothe*, 73 Mo. 74; *Henderson v. Henderson*, 55 Mo. 534. (2) The mortgage was not void for uncertainty. The degree of accuracy or particularity with which property may be described depends upon its nature. In this mortgage the horses, mules, farming implements and machinery were described so that any man might recognize them. Likewise the cattle. And the only manner possible in describing Cotswold sheep is to

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say "so many Cotswold Sheep." And the testimony shows conclusively that the officer who served the process had no trouble in identifying the mortgaged property as described in the mortgage. See *Conkling v. Shelly*, 28 N. Y. 360; *Gardner v. McEwen*, 19 N. Y. 123; Hermann on Chattel Mortgages, 73, 75. (3) The fact that the mortgageor remained in possession was no evidence of fraud. (4) The plaintiffs in error signally failed in their attempt to show that the mortgageor had sold or attempted to sell any of the mortgaged property until the institution of this suit. And even if he had sold the property, there is nothing in the testimony or circumstances to show that the mortgagees knew of it; and therefore the mortgage could not have been affected thereby. *Howell v. Bell*, 29 Mo. 135; Wag. St. § 8, p. 281; *Mertzner v. Graham*, 57 Mo. 404.

PHILLIPS, C.—This is a controversy between the mortgagees and an execution creditor of John E. Stonebraker touching the right to certain personal property of said debtor. In September, 1878, said John E. Stonebraker executed to A. and O. Stonebraker, his uncles, a chattel mortgage on certain personal property then on the farm of the mortgageor in Pike county. On judgment obtained by the defendant, Jacoby, the defendant Ford, as sheriff of said county, levied execution on the part of the mortgaged property to satisfy the same. Thereupon the plaintiffs brought this action in replevin and took possession of the property so seized by the sheriff. After a second trial before a jury, the plaintiffs recovered judgment. From this judgment the defendants have brought the case here on writ of error. Since the case came to this court the defendant, Ford, has died, and the cause has been revived, as to him, in the name of J. Gabriel Phillips, as his executor.

I. The first question presented by this record is, whether this action was not prematurely brought. To maintain the action the plaintiffs must show title, or a right to the present possession of the property which is the subject



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of the action. *Melton v. McDonald*, 2 Mo. 45; *Pilkington v. Trigg*, 28 Mo. 95; *Blakeley v. Patrick*, 67 N. C. 42. To determine this matter recourse must be had to the mortgage. It recites the following condition and provision:

"Upon condition that if he pay to said Alfred and Oliver Stonebraker, their executors, administrators and assigns \$5,000 and interest, according to his contract, the same being made to secure the said Alfred and Oliver Stonebraker against loss on account of their having become surety for him on certain notes, then this conveyance shall be void, otherwise to remain in full force and effect. And in case default be made in the payment of the debt above mentioned, or any part thereof, or of the interest due thereon on any day when the same ought to be paid, then the whole sum shall at the election of said Alfred and Oliver Stonebraker become immediately due and payable. The property hereby sold and conveyed to remain in his possession until default be made in payment of the said debt and interest, or some part thereof, but in case of a sale or disposal or attempt to sell or dispose of said property, or a removal of or attempt to remove the same from said farm without the consent of the said Alfred and Oliver Stonebraker, or an unreasonable depreciation in value thereof, the said Alfred and Oliver Stonebraker or their legal representatives may take the said property or any part thereof into their possession."

The proper construction of this language is that the mortgage was given to indemnify the mortgagees against loss as sureties of the mortgagor. Without some express contract authorizing it, the sureties would, ordinarily, have no cause of action against their principal until they had paid the debt of the principal. The express declaration of the mortgage is, that it was "made to secure the said Alfred and Oliver Stonebraker against loss on account of their having become surety for him on certain notes," and to be void if he shall save them harmless. This is the predicate or governing clause. To preserve the force and consistency of this declared object, the unavoidable con-

struction of the succeeding provisions is, that the "default in the payment of the debt *above mentioned*, or any part thereof, or of the interest due thereon" refers solely to the default of the mortgageor in protecting the mortgagees against "loss on account of their having become sureties for him." Then follows the stipulation, that "the property hereby sold and conveyed to remain in his (the mortgageor's) possession until default be made in payment of the said debt and interest, or some part thereof." The default manifestly refers to the mortgageor's failure to repay the sureties what they may lose by reason of their suretyship. Therefore, the mortgagees were not, by the terms of the mortgage entitled to possession of the property until they had paid the debt of the mortgageor or some part thereof. Until that event the mortgageor was entitled to the possession and this action was prematurely brought. *Sheble v. Curdt*, 56 Mo. 437; *Barnett v. Timberlake*, 57 Mo. 499. The plaintiffs' evidence shows that they did not, if at all, pay any part of the debt until long after the institution of this suit. In this view of the case the circuit court below should have given the instruction, in the nature of a demurrer to the evidence asked by defendant, at the close of the plaintiffs' evidence.

II. It is insisted by the defendant that the mortgage itself is inoperative, because the property named is not sufficiently described. The description of the controverted part is as follows: "Forty head of cattle, of different ages and sexes, most of them thoroughbreds, twenty head of Cotswold sheep." This property is described further as being on the mortgageor's farm in Pike county. The cattle involved in this suit are described as follows in the petition: "Sixteen head of thoroughbred, aged cattle." No sheep were levied on.

The testimony of John Stonebraker, introduced by the plaintiffs, is as follows: "At the time the mortgage was given, I had about forty-five or forty-six head of cattle on my farm of different ages and sizes." Is

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the description of the cattle given in the mortgage sufficient? It is "forty head of cattle, of different ages and sizes, most of them thoroughbreds." Had these been all the cattle on the farm, of mixed breeds, or had there been only "sixteen head of thoroughbred aged cattle" when the mortgage was given, the description would have been clear enough for identification. But what is there in this mortgage to identify or distinguish the forty head in the lot of forty-five or forty-six? The description applied to one of the cattle as well as the other. Were the sixteen head a part solely of the forty, or was any one of the sixteen a part of the excess over the forty? There can be no satisfactory answer to this question.

Where the recording of a mortgage, as under our statute, takes the place of actual delivery of the mortgaged property, the mortgage, to be effectual, must point out the subject matter of it "so that a third person by its aid, together with the aid of such inquiries as the instrument itself suggests, may identify the property covered." Jones Chat. Mort. 55. Shaw, C. J., in *Bullock v. Williams*, 16 Pick. 35, said: "It is to be understood that, the articles mortgaged must be of such nature and so situated as to be capable of being specifically designated and identified by written description. If they required to be weighed, measured, counted off, or otherwise separated from other and larger parcels or quantities, such requisites are not to be considered as dispensed with by registration."

It must be borne in mind that this is a controversy between the creditors and the mortgagee. The authorities hold, with marked unanimity, in such cases, that where there is a larger quantity of property of the same kind in the possession of the mortgageor than is embraced in the specification of the mortgage, and no particular description of the articles or property "otherwise than by their general class or number, nor any selection or delivery of the articles, nor any specification as to which are intended, out of a large lot of articles then on hand, such mortgage will

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be ineffectual to pass any title to any particular property, or to any interest in the property on hand." Jones Chat. Mort. 56; *Fowler v. Hunt*, 48 Wis. 347; *Blakeley v. Patrick*, 67 N. C. 42; *Croswell v. Allis*, 25 Conn. 312. In *Richardson v. Alpena L. Co.*, 40 Mich. 203, the mortgage covered "one hundred feet of white pine saw-logs, now on the north branch of Thunder Bay River." At the time, the mortgageor had a much larger amount of such logs at the given point. The mortgage was held void for uncertainty. Marston, J., *arguendo*, said: "As well might we undertake to enforce a chattel mortgage given upon ten head of cattle in a drove or herd of fifty. To sustain such mortgage, would, I think, enable parties to commit gross frauds, and would also tend to prevent third parties from afterward purchasing or acquiring interest in the property, a part of which had been thus mortgaged, and thus tend to discourage trade."

In *Kelly v. Reid*, 57 Miss. 89, the mortgage was given on, "thirty head of cattle, six oxen, three horses, two mules, three wagons, fifty hogs, etc." George, C. J., *inter alia* said: "The mortgage must mention some fact or circumstance connected with the property which will serve to distinguish it from all other property of the same kind. This fact or circumstance must be stated in the mortgage itself; it cannot be proved by parol testimony without thereby adding to the mortgage a term not contained in it. The object of a mortgage is to create a lien on certain specific property, and not to give a right to the delivery of any property whatever of the particular kind mentioned in it. If the description in the instrument be so vague and uncertain as necessarily to apply equally to all property of that kind, then it is clear there can be no identification of it, without proving some fact or circumstance connected with the property, not referred to in the mortgage. When a precise number only is conveyed, and there is in fact a greater number, and no intention is manifested to include the whole, there would be a failure to identify the particu-

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lar animals conveyed, and the deed is void for want of proper description."

In *Golden v. Cockril*, 1 Kans. 259, the mortgage was given on "one hundred and twenty-four head of mules" in the territory of Kansas. Creditors of the mortgageor seized nineteen head of these mules. Although it did not affirmatively appear that the mortgageor had any other mules in said locality the court said: "But he might have had a much larger number than he chose to include in the mortgage, and as there was nothing to distinguish those intended to be included in the mortgage from the rest, an indefinite amount of stock might, perhaps, have been shielded from the claims of creditors by the mortgage of a small part of them."

As to the cattle involved in this suit we must, therefore hold that the mortgage is inoperative, and the court erred in not giving the instruction to that effect requested by the defendant.

The judgment of the common pleas court is reversed, and the cause remanded for further appropriate proceeding in conformity with this opinion. All concur.

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SHOWLES V. FREEMAN; BAIRD *et al.*, *Plaintiffs in Error*.

1. **Judgments:** MOTION TO SET ASIDE. Irregular judgments may be set aside on motion filed any time within three years after the term at which such judgment may have been rendered.
2. **Bond, Recovery on:** AMOUNT. In suits on penal bonds with collateral conditions, no recovery can be had in excess of the penalty of the bond.
3. **Practice in Supreme Court:** BILL OF EXCEPTIONS. The record proper, regardless of the bill of exceptions and motion to set aside, shows that the judgment against the sureties on the penal bond is greater than the penalty, which is an error demanding the reversal of such judgment.



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*Error to Jackson Circuit Court.*—HON. S. H. WOODSON,  
Judge.

REVERSED.

C. O. Tichenor for appellants.

(1) To the extent, in the manner, under the circumstances pointed out in his obligation, the security is bound, and no further. *Farrar v. Christy*, 24 Mo. 474; *State ex rel. v. Sandusky*, 46 Mo. 377; *Wyman v. Robinson*, 73 Me. 384, and cases cited; *Railroad Co. v. Higfins*, 58 Ill. 133; *Miller v. Stuart*, 9 Wheat. 702; *Sims v. Harris*, 8 B. Mon. 55; *Brown v. Burrows*, 2 Blatch. 340. (2) The court has no power to render judgment against the securities, because plaintiff failed to comply with the order requiring him to give a new bond. 1 R. S., § 3851. (3) The motion by the securities to set aside the judgment, was not made until the next term after it was rendered. It was in time. 1 R. S., § 3727, p. 634; *Atkinson v. Arnick*, 25 Mo. 401; *Branstetter v. Rives*, 34 Mo. 318; *Downing v. Still*, 43 Mo. 309; *McGrew v. Foster*, 66 Mo. 30; *Phillips v. Evans*, 64 Mo. 16; *Smith v. Black*, 51 Md. 247; 34 Md. 40; *The Judd Co. v. Hubbell*, 76 N. Y. 543; *Lucre v. College Street*, 11 R. I. 472; *Foreman v. Carter*, 9 Kas. 674; *Leonard v. Collier*, 53 Ga. 387; *Foard v. Alexander*, 64 N. C. 70; *Hunt v. Yeatman*, 3 Ohio 16; *Reynolds v. Stansbury*, 20 Oh. 352; *Mills v. Dickson*, 6 Rich. L. 487; *Winslow v. Anderson*, 3 Dev. & B. L. 11; *Dedericks v. Richley*, 19 Wend. 112; *Mf'g & M. B'k v. Boyd*, 3 Denio 257; *Franks v. Lockey*, 45 Vt. 399; *Chase v. Wyeth*, 17 N. H. 486. (4) If it is the law, that to sign a replevin bond is to give authority to render a judgment for an unlimited amount; if the penal sum of a bond is not a limit to the jurisdiction of the court which renders judgment in a summary manner without notice, no man will be found rash enough to sign such a bond.

*H. M. Withers* and *R. O. Boggess* for respondent.

The circuit court had jurisdiction of the subject matter of the suit of Showles against Freeman. Const. of Mo., § 22, art. 6; 2 Wag. Stat., p. 808, § 3. When the replevin bond was filed in the circuit court, it thereby acquired jurisdiction of the persons of Showles and his securities, and had power to render judgment against them. 2 Wag. Stat., p. 1026, §§ 11, 12, 13; *Dilworth v. McKeltry*, 30 Mo. 149; *White v. Van Houten*, 51 Mo. 577; *Boutell v. Warne*, 62 Mo. 350; *Stevens v. Tuite*, 104 Mass. 328. This case might have been reversed if properly brought to this court by appeal or writ of error within the time allowed by the statute. *Smith v. Best*, 42 Mo. 185; *Wilson v. Boughton*, 50 Mo. 17. This was not done, the record in the case not even being brought to this court. There was no irregularity in the proceeding. *Jones v. Hart*, 60 Mo. 351, and authorities cited. An alleged irregularity will not do. *Powell v. Gott*, 13 Mo. 458; *Ex parte Tony*, 11 Mo. 662; *Callaway v. Nifong*, 1 Mo. 223. The court having jurisdiction of the person and subject matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction, and an erroneous decision of any of these other questions could not impair the validity and binding force of the judgment when brought in collaterally. *Gray v. Bowles*, 74 Mo. 419; *Ghan v. Christianson*, 41 Cal. 253; *Ellis v. Jones*, 51 Mo. 180; *Freeman v. Thompson*, 53 Mo. 183.

EWING, C.—Jacob Showles commenced a replevin suit in Jackson circuit court against R. Y. Freeman, constable, and the plaintiffs in error were Showles' securities on his replevin bond which was for \$35, double the amount sworn to in the affidavit, as required by the statute. § 3, 2 Wag. Stat., p. 1024. The defendant filed a motion asking the court to require the plaintiff to give a new bond, (2 Wag. Stat., 1025, § 8,) upon failure to do which in the time required by the order of the court the case was dismissed. Thereupon

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the court assessed the damages and rendered judgment against the sureties for \$250 and costs. Wag. Stat., §§ 11, 12. At the next term of the court the sureties, the Bairds, filed their motion as follows:

"Now come F. J. Baird and W. G. Baird and move the court to set aside the judgment heretofore rendered against them because the same is illegal, irregular and void for the following reasons: 1st. The judgment is against them as securities on the bond to defendant and is in the penal sum of \$35 while the judgment is for \$250 and all costs of suit. 2nd. Judgment was rendered without notice to said securities, or either of them." This motion was overruled by the court, whereupon they sue out their writ of error and bring the case to this court.

I. This motion was filed by authority of § 3727, 1 R. S., 1879, which is to this effect: "Judgments in any court of record shall not be set aside for irregularity, on motion, unless such motion be made within three years after the term at which such judgment was rendered." It has long been the recognized practice of this court that irregular judgments may be set aside on motion filed any time within three years after the term at which such judgment may have been rendered. *Stacker v. Cooper circuit court*, 25 Mo. 401; *Doan v. Holly*, 27 Mo. 256; *Moss v. Booth*, 34 Mo. 316; *Harkness v. Austin*, 36 Mo. 47; *Downing v. Still*, 43 Mo. 309; *Jones v. Hart*, 60 Mo. 351. Such irregularity as may be reached by motion is defined to be "the want of adherence to some prescribed rule or mode of proceeding, and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time or improper manner. *Tidds Prac.*, 512, 513. The question then arises is there such irregularity in this case as will authorize the judgment to be set aside on motion. Where judgment is rendered by default before the time for pleading has expired, it constitutes such irregularity as will authorize its being set aside.

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*Doan v. Holly*, 26 Mo. 186; *Branstetter v. Rives*, 34 Mo. 318; *Brackett v. Brackett*, 61 Mo. 221. In the last cited case Judge Wagner said: "If the court, by inadvertence or mistake, made a miscalculation in computing the amount, that would not be one of the irregularities contemplated by the statute." That was a case of attachment and the petition contained three counts; the first upon a promissory note and the others for money loaned. Judgment was rendered before the time for pleading to the two counts for money loaned had expired, and it was insisted, therefore, that it was irregular; but the judgment states that "the court finds from the pleadings and evidence that the defendant is justly indebted to the plaintiff in the sum, etc., \* \* the same being founded on a note for the direct payment of money." The court held that, although the judgment appeared to be for an amount greater than the note, yet that was a matter of calculation for the trial court, and did not come within the irregularities contemplated by the statute. But in the case at bar the judgment could require no calculation. It could not exceed the amount of the bond. The court could, under no circumstances, render judgment against the sureties for any sum in excess of the bond itself. It was bound not to exceed the penalty in the bond. The general principle is that in suits on penal bonds with collateral conditions no recovery can be had in excess of the penalty of the bond. *State ex rel. Moore v. Sandusky*, 46 Mo. 377; *Farrar v. United States*, 5 Peters 373; *Farrar v. Christy*, 24 Mo. 474; Sedg. on Dam., 426.

II. But, disregarding the motion and bill of exceptions, the whole record proper of this replevin suit is before this court on writ of error. From an inspection of that record it is apparent that the circuit court committed error by rendering judgment against sureties in a penal bond with collateral conditions for an amount greater than the penalty.

This is such error on the face of the record itself, as

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will authorize this court to reverse the judgment of the circuit court and remand the case for correction, and which is accordingly ordered. All concur.

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BLONDEAU *et al.* v. SHERIDAN, *Administrator, Appellant.*

1. **Practice: FAILURE TO FILE REPLY.** Where the failure to file a reply is the result of accident or inadvertence, the court may permit it to be filed after the jury is sworn for the trial of the cause.
2. **Covenant of Seizin: EASEMENT.** A covenant of seizin is not broken by the existence of an easement.
3. **Covenant against Incumbrances, Nature of.** A covenant against incumbrances is a covenant *in praesenti*, is a mere right of action, does not run with the land, is not assignable at law and can be taken advantage of only by the covenantee or his personal representative.
4. **Covenants of Warranty: EVICTION.** When the covenantee in a covenant of warranty of title never has had actual possession of the conveyed premises which was held adversely, and by reason of a paramount title he has never been able to obtain possession of the land, such inability to obtain possession will constitute an eviction.
5. ———: **BREACH OF: STATUTE OF LIMITATIONS.** Where there has been no decision against the paramount title, and within ten years after its extinguishment by the covenantee he brings his action on the covenant of warranty, he is not barred by the statute of limitations.
6. **Covenants Running with Land: TENANTS IN COMMON.** Tenants in common can maintain a joint action for breaches of covenants running with the land.
7. **Administrator, Judgment against.** The judgment in an action against an administrator, should not be against him personally, but against him in his representative capacity.
8. **Lost Instrument, Secondary Proof as to: WHEN FOUNDATION FOR INSUFFICIENT.** Before secondary proof of the contents of a paper can be read in evidence, there must be proof of such search by the party who had custody of it as to reasonably warrant the conclusion that it is either destroyed, lost or mislaid, and cannot be found. Where the witness examined as to its existence states that, although he has looked for it, he may still have it in his possession, the foundation for secondary proof is not sufficiently laid.



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*Appeal from Buchanan Circuit Court.*—HON. WM. H. SHERMAN, Judge.

REVERSED.

*Strong & Mosman* for appellant.

The court erred in failing to render judgment of *non prosequi*, in defendant's favor and against plaintiffs, when so requested, after the jury were sworn to try the cause, and after the petition and answer were read to the jury. R. S., §§ 3677, 3678; *Ennis v. Hogan*, 47 Mo. 515. The court erred in permitting plaintiffs to introduce evidence, against objection of defendant, that the petition did not state facts sufficient to constitute a cause of action. There is no allegation of breach of covenant "for further assurance," nor facts stated in the petition constituting such breach. *Armstrong v. Darby*, 26 Mo. 517; *Rawle Cov.*, (3 Ed.) 193, note, and citations; *Rawle Cov.*, 195, 199, 200; *Miller v. Parsons*, 9 Johns. 336. The petition shows no breach of the covenant of seizin. *Rawle Cov.*, (3 Ed.) 51; *Kellogg v. Malin*, 50 Mo. 499; 2 Wash. Real Prop., (3 Ed.) 345; *Cook Co. v. Railroad Co.*, 35 Ill. 460; Wash. on Easement, (3 Ed.) 14; *Winslow v. King*, 14 Gray 321. The facts pleaded do not show breach of covenant "warranty," which is a covenant for quiet enjoyment. 4 Kent Com., (8 Ed.) 530. Which is broken only by eviction or its equivalent. 3 Wash. Real Prop., (3 Ed.) 398. Is a personal covenant. *Ib.*, 399. Mere limitations or restrictions upon the use of land are not evictions. The title remains in the grantee, as also the possession. A covenant of warranty is not a covenant against incumbrances. See note to *Sanderlin v. Baxter*, 44 Am. Rep. 170. The petition does not state facts so as to enable the damages to be measured, or for breach of "seizin," or that of warranty. *Sedgwick on Dam.*, (3 Ed.) 172; 3 Wash. Real Prop., (3 Ed.) 419; *Dickson v. Desire*, 23 Mo. 166; *Long v. Mathews*, 23 Mo. 438; *Hutchins v.*

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*Roundtree*, 77 Mo. 500. The petition does not state facts such as to enable the court and jury to ascertain and measure the damages as for a breach of covenant against the incumbrance created by a permanent easement, such as the party wall described. 3 Wash. Real Prop., (3 Ed.) 421; *Harlow v. Thomas*, 15 Pick. 66. A party wall is simply an easement. "It is not a freehold in the soil." 2 Wash. Real Prop., 276; *Ritgee v. Parker*, 8 Cush. 145; *Prescott v. Trueman*, 4 Mass. 627; *Cary v. Daniels*, 8 Met. 482. Only actions on covenants of seizin and warranty survive ten years after breach. R. S., § 3229. Actions for breach of covenant against incumbrances must be brought within five years after breach. R. S., § 3230. If we allow plaintiffs to be proper parties plaintiff, (which we do not,) they are barred, because they show, on the face of the petition that their right of action accrued, upon their own theory of the case, May 29th, 1875; and their suit was begun January 18th, 1881. But they are not proper parties. The covenant against incumbrances is personal. It does not run with the land. It is broken the instant the deed is delivered. This incumbrance did exist when McGee conveyed to plaintiff's grantor in 1873. "If one of two adjacent owners covenant with the other, if he would erect a party wall the former would pay the latter for one-half of it, whenever he should use it, held a personal covenant, and not to run with the land so as to bind the purchaser of the covenantor who should erect a building against the party wall. 2 Wash. Real Prop., 263; *Black v. Isham*, 16 Am. L. Reg. 8; *Weld v. Nichols*, 17 Pick. 543; *Cole v. Hughes*, 54 N. Y. 444. Lutz, the grantee of Hartwig, could not, therefore, have recovered from plaintiffs. Their payment to him was voluntary. "A permanent easement is as much an incumbrance when the deed is made as it ever can be, and of course detracts from the value of the estate at the time of the conveyance." Wash. Real Prop., 391, 392. "Being *in praesenti* it is broken as soon as made." "Covenants *in praesenti*, being broken as soon as made, cannot, for

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obvious reasons, run with the land to subsequent owners, so as to entitle them to sue for breach thereof." 3 Wash. Real Prop., (3 Ed.) 394. The court erred in overruling defendant's several objections to items of evidence. No sufficient ground was laid for the secondary evidence of contract between McGee and Hartwig. R. S., § 674; *Geary v. City of Kansas*, 61 Mo. 378; *Parkinson v. Caplinger*, 65 Mo. 294. The court erred in refusing to instruct as prayed, "that under the pleadings and evidence the plaintiff could not recover." Plaintiffs must recover, if at all, on the cause of action stated in their petition. "The only covenant implied in the words, 'grant, bargain and sell,' which runs with the land, is that for further assurance." "The word 'assigns,' as used in our statute, is limited to that covenant." *Collier v. Gamble*, 10 Mo. 467. No breach of that covenant is pleaded. Plaintiffs then are not "assigns" of McGee, nor was Lutz "assign" of Hartwig. *Railroad Co. v. Morgan*, 72 Ill. 158; *Cole v. Hughes*, 54 N. Y. 444. Action for breach of "seizin" or of "warranty" must be brought within five years. *Lawless v. Collier*, 19 Mo. 480; *Hall v. Bray*, 51 Mo. 292. The petition and evidence showed that plaintiffs were not assigns of McGee, as meant by that word in either his deed to M. S. Bradley, or in his contract with Hartwig, within the meaning of the statute in respect to the wall, also that Lutz never became the assign of Hartwig, as meant in the contract between Hartwig and McGee. *Pomeroy v. Railroad Co.*, 25 Mo. 643; *Dixon v. Railroad Co.*, 3 A. & E. R. R. cases 201; *Tenbrooke v. Sahke*, 77 Pa. St. 392; *Cole v. Hughes*, 54 N. Y. 444; *Todd v. Stokes*, 10 Pa. St. 155; *Gilbert v. Drew*, 9 Pa. St. 219; *McGadden v. Johnson*, 72 Pa. St. 335; 65 Me. 591.

HENRY, J.—On January 18th, 1881, plaintiffs filed in the probate court of Buchanan county their demand for \$433.36, against said estate, and, at the April term 1881, the court found against plaintiffs who then appealed to the circuit court, where they filed an amended petition, alleging, in sub-

stance, that McGee died in May, 1880, and that Sheridan administered on his estate in August, 1880. That plaintiffs are, and since 1872, have been partners. That on the 10th of January, 1873, McGee conveyed by deed to Mathias Bradley the north half of lot No. 10 of block 21, in the town of St. Joseph, in the granting clause thereof employing the words "grant," "bargain" and "sell," the deed containing, also, an express covenant that the grantor, his heirs and executors, etc., would warrant and defend the title to said real estate against the lawful claims of every person whatever. That prior to that time, on the 29th of March, 1872, McGee, the grantor, entered into a written agreement with one Hasting, by which he granted to Hasting, who owned the adjoining lot, the right to extend and build one-half of the thickness of a wall to be erected by said Hasting on the line between said lots, over and on the lot of said McGee (said lot No. 10) the dimensions of said wall to be footing four feet six inches in thickness, upper wall two feet thick, brick wall one foot six inches thick and eighty feet in length, one half of which the entire length and height to extend over and on lot 10, with the further stipulation, that said "McGee, or his assignee should at any time, paying one-half the cost of said wall or such part thereof to the said Hasting or his assignee, have the right and privilege of building to and using said wall and make it constitute one of the walls he may choose to erect adjacent thereto, and may use said wall for all reasonable purposes in erecting and constructing such building." That said agreement was duly acknowledged and was, on 9th of April, 1872, filed for record in the recorder's office of said county. That Hasting erected the wall mentioned in said agreement before McGee conveyed to Bradley.

That on the 15th day of February, 1875, plaintiffs each became the owner of an undivided half of said lot No. 10 by virtue of conveyances from Mathias Bradley and his grantees, and afterwards mutually agreed to hold, and have ever since held the same as partnership property.

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That McGee, at the time of the conveyance to M. S. Bradley, was not seized of an indefeasible estate in fee simple in said real estate, that it was not free from incumbrance, etc., and that McGee had not warranted or defended the title, but on the contrary, on the 29th of May, 1875, Lutz, assignee of Hasting, entered said lot No. 10 and evicted plaintiffs from that part of said lot upon which said wall stood, having the right to do so by virtue of the agreement aforesaid, and that plaintiffs were compelled to, and did on the 29th of May, 1875, pay to said Lutz \$336.46, in order to extinguish his right and title to said part of said lot, and to said wall to the length of sixty-two feet and eight inches, and that it was worth that sum. And asked judgment for \$433.46.

The answer was a general denial, the statute of limitations, and that plaintiffs voluntarily paid the money to Lutz. Plaintiffs obtained a judgment from which defendant has appealed.

At the trial after the jury was sworn, defendant called attention of the court to the fact, that plaintiffs had filed no replication, and demanded a judgment of *non pros.* against them, which the court refused, and permitted plaintiffs to file their replication.

Section 3677, Revised Statutes, provides that: "If the plaintiff shall fail to file his replication, or other pleading within the time prescribed by law, or the rules of practice of the court \* \* judgment of *non pros.* shall be given against him." But by the next section it is provided, that such judgment, for good cause shown, may be set aside at any time during the term, upon such terms as shall be just. In *Ennis v. Hogan*, 47 Mo. 513, it was held that, if the failure to reply was the result of accident, or mistake, the judgment should have been set aside, had the court been asked to do so in season. If the court, in this instance, had rendered the judgment demanded, it would have set it aside when it was made to appear that the failure was but an accident or oversight. And it would have been



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a useless ceremony to enter the judgment, and immediately set it aside on grounds sufficiently manifest, when the judgment was rendered, and upon which we may assume, the court refused the judgment, and permitted plaintiff to file the replication.

The defendant objected to any evidence on the ground that the petition did not state facts constituting a cause of action. The covenant of general warranty, and two of the statutory covenants, viz.: that of seizin and that against incumbrances, are alleged in the petition to have been broken. The facts alleged constituted no breach of the covenant of seizin. "That covenant is not broken by the existence of easements or incumbrances which do not strike at the technical seizin of the purchaser." Rawle on Cov. (3rd Ed.) 51. In *Kellogg v. Malin*, 50 Mo. 496, it was held that the occupancy of land by a railroad track, under condemnation proceedings, was but an easement, and could not be relied upon as a breach of the covenant of seizin. There was however a breach of the covenant against incumbrances, but where did it occur?" It is a covenant *in praesenti* and broken as soon as made." Rawle on Cov. 110. Again he says at page 336: "It is a settled rule on both sides of the Atlantic that until breach, the covenants for title, without distinction between them, run with the land to heirs and assigns. But, while this is well settled, a strong current of American authority has set in in favor of the position, that the covenants for seizin, for right to convey, and perhaps against incumbrances, are what are called covenants *in praesenti*. If broken at all, their breach occurs at the moment of their creation; the covenant is, that a particular state of things exists at that time, and, if this be not true, the delivery of the deed which contains such a covenant causes an instantaneous breach; these covenants are then, it is held, turned into a mere right of action, which is not assignable at law, which can be taken advantage of only by the covenantee or his personal repre-

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sentatives, and can neither pass to an heir, a devisee, nor a subsequent purchaser."

Chancellor Kent, at page 555, 4th Volume of his commentaries, says: "The covenant of seizin, and of a right to convey, and that the land is free from incumbrances are personal covenants, not running with the land or passing to the assignee; for, if not true there is a breach of them as soon as the deed is executed. But the covenant of warranty and the covenant for quiet enjoyment, are prospective and an actual ouster or eviction is necessary to constitute a breach of them, and that the general covenant to warrant and defend the title" is in effect a covenant for quiet enjoyment. Page 558. Our statutory covenant against incumbrances, contained in the words "grant," "bargain" and "sell" is that the real estate was at the time of the execution of such conveyance free from incumbrance. The difficulty which exists when the incumbrance is of a kind which does not affect the possession of the grantee, as in case of a mortgage or a judgment lien, which must be extinguished by the grantee before he can claim more than nominal damages, is not encountered when the incumbrance is such, that, as in the case at bar and in *Kellogg v. Malin*, *supra*, the entire damages could at once be ascertained and assessed to the grantee, and there is no way of removing it but by purchase. While it exists, the covenantee cannot have the possession of that portion of the land.

There was a breach of the covenant the moment it was made, and M. S. Bradley, then had a right of action, and, the covenant not running with the land, plaintiffs never had a right of action upon it. As to the covenant of general warranty, the facts alleged showed a breach of the covenant. The note was not only an incumbrance on the lot, but Lutz's rightful possession of it, under the agreement between McGee and Hasting, constituted a breach of the covenant of warranty. "Where the covenant is broken immediately no actual eviction or disturbance need be shown." *Grannis v. Clark*, 8 Cowen 41. In *Grist v. Hodges*,

3 Deveraux 200, Ruffen, J., said: "The existence of an incumbrance, or the mere recovery in a possessory action under which the bargainee has not been actually disturbed, are held for technical reasons, not to be breaches of a covenant for quiet possession, or in other words of our warranties.

But that is a very different case from this, in which the bargainee never, in fact, was in possession, but was kept out by the possession of another, under better title existing at the time of sale and deed and ever since." "As between the bargainor and bargainee the latter is in by force of the statute of uses," "but, if there be in reality an adverse possession, he can only be held to be in for an instant; for there will be no implication against the truth further than is necessary to make the deed effectual for its purposes. If such adverse possession be upon title paramount, then there is an eviction of the bargainee *eo instante* that the possession conferred by the statute takes place." Mr. Rawle says: "The general principle, thus ably explained, has been recognized and applied in many other cases." They are cited in note 2, page 254, and at page 255 he says: "The rule best supported by reason and authority would seem to be this, where at the time of the conveyance, the grantee finds the premises in possession of one claiming under paramount title, the covenant for quiet enjoyment, or of warranty, will be held to be broken, without any other act on the part of either the grantee, or the claimant."

Here was a constructive eviction. The covenantee never had actual possession of the strip of land in question, which was held adversely, and when the covenantee by reason of the paramount title has never been able to obtain possession of the land, such inability to get possession will be an eviction. Rawle on Cov., 251. This is not the case of a party wall, which is a wall for the common use of the proprietors of adjoining estates, to the erection of which each contributes his due proportion of the costs, and each has a right to the use of the entire wall. That

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is but an easement, but here the wall belonged to Hasting, and, under the agreement, he had possession of a strip of land off of lot ten, adverse to the owner of said lot. It was a permanent structure and as effectually excluded plaintiffs from the possession, as if the owner of the wall, had had a paramount title to the strip in question.

Was the right of action on this covenant barred, by the statute of limitations when this suit was commenced? Section 3229 of the Revised Statutes, declares that "actions brought on any covenant of warranty contained in any deed of conveyance of land, shall be brought within ten years next after there shall have been a final decision against the title of the covenantor on such deed." Strictly construed, until a judicial decision against the covenantor's title, the statute does not begin to run and the covenantee might extinguish the title and maintain his suit on the covenant without regard to the lapse of time. A reasonable construction of the statute, however, one in concurrence with the policy of the law, would only allow the covenantee the statutory period, after the extinguishment of the paramount title; but without passing upon that question, and however it may be answered, there was no decision against the grantor's title, and within ten years after the title of Lutz was purchased by plaintiffs, they instituted this suit, and we do not think the statute barred the action.

Did the court err in holding that plaintiffs could join in this action? The question is not free from difficulty. Authority on the precise question I have not found, after a tolerably diligent and laborious search. None is cited by appellant's counsel, and respondent has filed no brief. In Coke upon Littleton is the following passage: "And here it is to be observed that an assignee of part of the land shall vouch as assignee. As if a man making a feoffment in fee of two acres to one with warranty to him, his heirs and assigns, if he make a feoffment of one acre, that feoffee shall vouch as assignee; for there is a diversity between the whole estate in part, and part of the estate, in the

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whole or in any part." If in the case at bar, Bradley, the grantor of McGee, had conveyed to each of the plaintiffs one-half of the lot in question by metes and bounds, each conveyance including one-half of the strip of land in question, it would have been a case like that put by Lord Coke and each would have to sue for a breach of covenant.

But here, each has a part of the estate in the whole, acquired at different times, it is true, but they have an interest in common, each in every inch of the lot occupied by the wall. By the several conveyances their grantor, Bradley, assigned all his interest in the covenant, and the plaintiffs acquired it together, as if they held under one deed. The several deeds of their grantor made them tenants in common, as a deed to them jointly would have done, and in the latter case, the authorities are all agreed, that they might maintain a joint action for a breach of covenants running with the land. In Pennsylvania it seems to have held, that the action must be joint. *McClure v. Gamble*, 27 Pa. St. 288; see, also, Rawle on Cov., 356.

With respect to the question of damages, appellant contends that the court erred in its instruction allowing plaintiffs to recover of McGee's estate the amount paid by them to Lutz for the use of said wall, not however, to exceed the one-half of the value of said wall, with interest at six per cent per annum from the date of payment. "The measure of damages (counsel contends) is the amount of the diminution of the value of the premises conveyed, occasioned by the irremovable easement." It must be borne in mind, that the fee of the strip of land in question was conveyed to plaintiffs, that the conveyance carried the wall which was part of the freehold as against McGee; and, while it is said, that plaintiff only acquired the right to use the wall by the purchase from Lutz, yet, this right was of equal duration with the estate in the strip of land itself, for the fee in that strip being in them, under the deed, when they acquired the right to the joint use of the wall with Lutz, they reduced his interest in the land to an ease-



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ment, in the strict sense of the term. He still had the right to the use of the entire wall, but not as before the exclusive right to use it. The transaction was, in effect, the purchase of the right to that strip vested in Lutz, as assignee of Hasting, under the agreement with McGee, followed by the erection of the wall. Lutz had no paper title to the strip, it is true, but having erected the wall upon it, under the agreement with McGee, it effectually passed a right to occupy and possess the strip forever, or as long as the wall might stand. The court applied a rule for the assessment of damages of which, certainly, appellant cannot complain for after plaintiffs paid for half of the wall, Lutz had an easement on the strip of lot 10 which is occupied.

The court, however, committed two errors which will necessitate a reversal of the judgment. The suit was against Sheridan, as administrator of the estate of McGee, and yet the judgment is against him personally, and not *de bonis*. This might be obviated, but for another error which occurred at the trial, in permitting a copy of the written contract between Hasting and McGee to be read as evidence, before sufficient grounds were laid for the introduction of such secondary evidence. Hasting testified as follows: "I had the original of this contract handed me by McGee. Don't know what has become of it; don't remember what I did with it; I may have the paper somewhere; I have looked for it."

Courts are not very strict in their rulings upon this question, but to permit copies of original papers to be read as evidence, on such foundation as that laid here would be in effect, to abrogate the rule altogether. There must be proof of such a search for the original, by the party who had custody of it, as reasonably warrants the conclusion that it is either destroyed, lost or mislaid, and cannot be found. Where the witness states that he may have it in his possession it shows that, notwithstanding he has looked for it, he may, by a diligent search in the proper places, find

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it, and that the search he had made was by no means thorough or satisfactory to himself.

The judgement is reversed and the cause remanded.

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BOTKIN, *Appellant*, v. McINTYRE.

**Contract:** ASSENT OF PARTIES. There can be no contract without the assent of the parties thereto, but this assent may be indicated in various ways, and courts cannot say what facts, or words or acts indicate the agreement between the parties. Each case must be governed by its own facts, and it is error to instruct the jury that silence at the time does not constitute assent, unless there was some overt act of acquiescence after the thing proposed had been done

*Appeal from Audrain Circuit Court.*—HON. ELIJAH ROBINSON, Judge.

AFFIRMED.

*George Robertson* for appellant.

Respondent proposed to exchange hay. Appellant did not assent. The essentials of a contract are: 1st, Parties; 2nd, Consideration; 3rd, Assent of parties; 4th, The subject matter. Without these four essentials there can be no contract. 1 Parsons on Cont., (5 Ed.) p. 8. There was no assent of parties, hence no contract. "Agreement requires for its creation, at least, two parties." The parties must have a distinct intention, and that intention must be common to both. When there is doubt or difference, there can be no agreement. Anson on Cont., (1 Ed.) p. 2. "In the case of contracts which are made by the acts of the parties, and not by proposal and acceptance in words, it would appear that silence must give consent; but then it must be silence coupled with some overt act of acquiescence." Anson on Cont., (1 Ed.) p. 16. There was no

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overt act of acquiescence on the part of plaintiff and the fifth instruction asked by him should have been given.

*F. M. Brown* for respondent.

Where the court tries the case without a jury, this court will look to the facts found, and if they warrant the judgment it will be affirmed, without regard to the instructions given or refused. *Robinson v. Rice*, 20 Mo. 229, 236. The third instruction was embraced in the second given and it was not error to refuse it. *Martin v. Smylee*, 55 Mo. 577; *State v. Miller*, 67 Mo. 604. Plaintiff did assent to defendant's proposal to exchange stacks of hay. He made no reply, was silent. "So, also, the silence of either party will import assent to the terms of the contract, whenever it would have been incumbent on him to express his dissent, if he did not agree thereto; or when his silence is explicable only by the presumption of his assent. But whether the facts of the case indicate a mutual agreement, is for the jury to determine." Story on Cont., § 379; *Hubbard v. Coolige*, 1 Met. 93; *Thurston v. Thornton*, 1 Cush. 89. "If a party by his silence directly leads another to act to his injury, he will not be permitted, after injury has happened, to then allege anything to the contrary, for he, who will not speak when he should, will not be allowed to speak when he would." *Pelkington v. Ins. Co.*, 55 Mo. 172, 178. His silence was an admission that he had no objection, and such silence may have the same contractual force and bind as effectually as words of assent. Wharton Law of Cont., § 6. If the plaintiff caused or did not prevent a false impression when he might have done so, and the defendant acted on the honest belief that plaintiff did consent, then plaintiff is estopped to assert anything now to the injury or prejudice of the defendant in respect to that matter. 2 Parsons on Cont., (5 Ed.), p. 793; *Freeman v. Cooke*, Exch. (Welby H. & Gordon) 654; *Chouteau v. Goddin*, 39 Mo. 229; *Bales v. Perry*, 51 Mo. 449; *Spurlock v. Sproule*, 72 Mo. 503.

EWING, C.—This suit was commenced before a justice of the peace to recover the value of one stack of hay, alleged to have been used by the defendant without authority, and for damage to certain other hay of plaintiff by the defendant's stock. Verdict and judgment for defendant, from which plaintiff appealed to the circuit court, where, upon a trial *de novo*, the result was again in favor of the defendant, and the plaintiff brings the case here by appeal.

It appears that in September, 1879, the respondent sold the appellant a lot of hay then standing on respondent's farm in Audrain county. At the time of the sale the respondent had other hay standing in the same meadow, and he also had some stock, a few head of cattle and horses, running in the meadow and being allowed to remain there for some time they ate around the bottom parts of the stacks and consumed some portion of such as they chose to go to. The respondent went to the appellant and told him that with his (appellant's) consent he would use two of the stacks in the north meadow because they had been injured by the stock, and leave appellant two other stacks in the south meadow. Appellant made no reply and respondent used one of the stacks. The plaintiff then sued for the stack of hay so taken, and for damage to the others. The evidence tended to show that the defendant, when he sold the hay to plaintiff agreed to remove his stock from the meadow, as soon as he could sell it, but that the stock must run in the meadow until that time.

Upon the other branch of the case, the evidence tended to show that defendant went to plaintiff and told him that the stock had damaged the hay in the north meadow: "If you will let me, I will use two of those stacks damaged, and leave you two in their place in the south meadow." Plaintiff made no reply, but turned and walked off. That the north meadow hay was a pure timothy and worth more than the other which was part "red top."

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It is insisted by the appellant that there was no agreement between plaintiff and defendant, that defendant should use two stacks of hay in the north meadow, and leave, for plaintiff, two in the south meadow in lieu thereof, because there was no assent by plaintiff to the proposition of defendant, and that the court erred in refusing the fifth instruction asked by the plaintiff, which is as follows :

5. The court declares the law to be that, before there could have been a contract for exchange of hay between plaintiff and defendant, there should have been an assent, on the part of plaintiff, to defendant's proposition of exchange; and that mere silence on the part of plaintiff to said proposition, at the time it was made, does not constitute such assent, unless it further appears from the evidence in the cause, that there was some overt act of acquiescence on the part of plaintiff to the use of the stack of hay by defendant, after he (plaintiff) learned that defendant had taken it.

This instruction is too broad in its requirements. By it the proposition is asserted that no act on the part of plaintiff could show his assent to the proposal for exchange of hay made by the defendant, except that act was after plaintiff had learned that defendant had taken the hay. This was taking from the jury every question, save those "overt acts of acquiescence on part of plaintiff" indicating his assent, which took place after defendant had taken the hay. No other act could be inquired into. Many things might have been done by plaintiff which would indicate to the triers of the fact his assent. There can be no contract without the assent of the parties thereto. 1 Parsons on Con., p. 8. But this assent may be indicated in various ways. The courts can not say what facts, or words, or actions indicate the agreement between parties. Each case must be governed by the facts and circumstances developed, and by which the triers of the fact must be led to the truth.

The question, moreover, was fairly submitted in the



first instruction asked by the plaintiff and given by the court; under which the court sitting as a jury could not find for the defendant without directly passing upon the question of the consent of plaintiff to the defendant's proposition for exchange.

Having done so, this court cannot question the propriety of the verdict and judgment below, which is affirmed. All concur.

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NORTH *et al.* v. PRIEST, *Administrator, Appellant.*

1. **Administration: DEMANDS: DISTRIBUTION.** On an application by a creditor of an estate for an order on the administrator to pay his demand, which has been duly exhibited and allowed, the answer of the administrator that he has paid over the funds of the estate to the distributees, and for that reason has no funds on hand, constitutes no valid defense to the application.
2. ———: **ANNUAL SETTLEMENTS, FORCE OF.** Annual settlements are only interlocutory steps in the proceeding *in rem*, which terminates in the final settlement and order of discharge. They have not the effect of judgments, no appeal can be taken from an order approving them, they may all be reviewed at the final settlement, and proceedings to falsify and surcharge the final settlement, need not ask to have them set aside, but when the final settlement is opened, they are all open for examination and correction.
3. ———: ———: **EXCEPTIONS: EVIDENCE.** It is not necessary during the administration that formal exceptions should be filed to annul settlements, in order to contradict their import in any proceeding in which they are submitted as evidence. When invoked against the administrator, he is entitled to any evidence they may contain in his favor, but they are conclusive neither for nor against him.

*Appeal from St. Louis Court of Appeals.*

**AFFIRMED.**

*J. M. & C. H. Krum* for appellant.

- (1) The circuit court, without proof, assumed author-  
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ity to falsify the account of defendant, and struck from it certain credits the effect of which was to change or increase the balance in his hands. The settlement made by the administrator January 31st, 1879, was not a final settlement, and it required proof to justify the court in striking out the items in question, other than the account itself. (2) An administrator's account may be falsified, but only by bill or petition, and upon sufficient evidence. In this case it was done on verbal motion, without specification and proof. (3) A bill to falsify or surcharge the accounts of an administrator implies and necessarily charges that defendant has failed to fully account for moneys or assets received by him in the particulars specified in the bill, and the burthen rests upon plaintiff to show this. Story Eq. Plead., § 801; *Clymer v. Anderson*, 49 Mo. 37; *Williams v. Pettigrew*, 62 Mo. 460. (4) Though the settlement made by defendant at the December term, 1878, was not a final settlement, a creditor or other party could not come in afterward, and without proof and notice, readjust or restate the administrator's account without his consent, as was done in this case. (5) The finding of the referee was contrary to the evidence, and the circuit court erred in approving and confirming it by its judgment. (6) The finding of the referee was excessive, and the circuit court erred in affirming it. (7) The lower courts erred in assuming that the debt in question was the only debt in that class.

*Hudgens & Davis* for respondent.

MARTIN, C.—The only question presented by the appeal in this case is, whether on an application by a creditor of an estate for an order on the administrator to pay his demand, which has been duly exhibited and placed in the fifth class of claims, the answer of the administrator, that he has paid over the funds of the estate to the distributees, and, for that reason, has no funds on hand, constitutes a valid defense to the application. The St. Louis probate court,

St. Louis circuit court and St. Louis court of appeals all held, in concurring opinions, that such payment was no discharge of the funds on hand, and would constitute no defense to the application. A similar conclusion was announced in the case of *Bassett v. Slater*, ante, p. 75.

It is claimed by the administrator in this case, that inasmuch as he entered the payments to the distributees in his first settlement, which was formally passed and approved by the probate court, the legality of such discharge of the funds cannot be questioned by any one interested in the estate, except on a direct proceeding to set aside the order approving the settlement. This position is assumed under a misconception of the nature and effect of an annual settlement. Such settlements are only interlocutory steps in the proceeding *in rem*, which terminates with the final settlement and order of discharge. The binding effect of the final settlement rests upon the notice and proclamation to all persons interested in the estate to come forward and make known their objections to the administration before it is closed. *Fenix v. Fenix*, 80 Mo. 27. The preceding settlements do not have the effect of judgments. *Picot v. Biddle*, 35 Mo. 29. In *Baker v. Runkle*, 41 Mo. 391, the court remarks in the opinion of Fagg, J. "It has been the uniform practice of the courts having probate jurisdiction, and we think correctly so, to treat these annual settlements of accounts as mere exhibits of the condition of estates, and upon which orders for the payments of debts or distribution might be made according to the circumstances of the case." No appeal can be taken from an order approving them. They are only consecutive steps leading to the final settlement, which necessarily includes them. At the final settlement the court can go back and review all the annual settlements. *In re Davis*, 62 Mo. 450. And proceedings to surcharge and falsify the final settlement, need not ask to have the annual settlements set aside. They are merged in the final settlement, and when that is opened, they are all open for examination and correction

*Sheetz v. Kirtley*, 62 Mo. 417. It is not necessary, during the administration, that a person interested in the estate should file formal exceptions to them in order to contradict their import in any proceeding in which they are submitted as evidence. Like any other settlements of the administrator, they may be regarded as *prima facie* as against him. When they are invoked as evidence against him, he is, undoubtedly, entitled to any evidence they may contain in his favor, like any other paper asserted against a party. But no such evidence can be accepted as conclusive either for or against him.

For the purpose of argument in this case, it may be conceded that, when the petitioners for the order submitted the annual settlement in evidence, the administrator was entitled to the presumption that his payment of the funds to the distributees, as disclosed in the settlement, was made under circumstances which would protect him against the claims of creditors. But this presumption was thoroughly rebutted before the referee by the recitals in the judgment on their claim given in evidence, from which it appears that it culminated in a final judgment in the court of appeals against the estate as early as May 27th, 1876. As against the claim, thus exhibited, the subsequent payments to the distributees in 1877 and 1878 were in positive violation of the lien of the complaining creditors which it was the duty of the administrator to protect, as taking precedence of the rights to distributees. His payments were of his own motion and in violation of law. His appeal from the order is without merit, either in substance or form.

The judgment of the court of appeals is therefore affirmed. All concur.

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Parke v. Thompson.

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PARKE V. THOMPSON *et al.*; BUCK, Appellant.

**Equity:** QUESTION OF FACT: EVIDENCE SUPPORTING DECREE. The only question contained in this appeal being the validity and binding effect of an assignment of a trust fund; *Held*, this being a question of fact, and as the evidence, although conflicting, supports the decree, it is affirmed.

*Appeal from Jackson Circuit Court.*—HON. F. M. BLACK,  
Judge.

AFFIRMED.

*Samuel P. Sparks* for appellant.

Only two questions are involved in this case. 1st, What kind of an estate did Jane and T. P. Thompson take under the will? 2nd, Was the assignment to appellant, Buck, procured by such means that it should be set aside in equity? We think that the decision of the circuit court in construing the will was correct. R. S. 1865, p. 231, § 45. But the court erred in rescinding the contract of assignment to appellant, for the reason that there was no evidence to justify such action, and must have been founded on presumption, arising alone from the relation of Buck to the trustee. *Bernecker v. Miller*, 44 Mo. 132. There is nothing in this case to take it out of the general doctrine, where all the facts bearing upon the transaction, will as well consist with honesty as dishonesty and fraud. The court ought not to find it to be corrupt and fraudulent; the proof of fraud should be perfectly satisfactory. *Dallam v. Renshaw*, 26 Mo. 533. What the evidence of Thompson and Wood tended to show, that Parke, the executor, told them, and the representations which the court found he made, were not representations, even if true. These were mere expressions of opinion. *Union National Bank v. Hunt*, 76 Mo. 439; 1 Perry on Trusts, § 174. If the court could have presumed fraud from the facts that interpleader, Buck,



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was the partner and son-in-law of the executor, the evidence of Col. Elliott, that he explained to them at the time the deed was executed, the nature and extent of the security given the executor by Ridings & Co., completely rebutted the presumption. The deed of assignment was executed Oct. 31st, 1878. Jane Carr and her husband, up to the date of her death, in 1879, were never heard to complain. Nor T. P. Thompson, until June 15th, 1880, but both parties as late as Oct. 31st, 1879, received goods in part payment of the balance due from Buck, and with full knowledge of the condition of the fund. Disaffirmance for fraud must be exercised promptly. *Estes v. Reynolds*, 76 Mo. 563; *Hart v. Handlin*, 43 Mo. 171; *Dougherty v. Stamps*, 43 Mo. 243; 48 N. Y. 200; 9 Hare, 262; 5 De. G. M. & G. 139; 4 Paige 537; 24 Wend. 74; 3 Sneed 220; 7 Rob. Pr. Ch. 25, § 2, p. 482; 5 R. I. 130. Courts will rarely rescind an executed contract without proof of fraud. *Reese v. Smith*, 12 Mo. 344; *Owens v. Owens*, 8 C. E. Green.

G. N. Elliott for respondent.

MARTIN, C.—This was a suit in equity by a trustee to obtain a judicial construction of a clause in a will under which the trustee received and holds a trust fund.

On the 12th day of December, 1867, one Hugh Parke of Johnson county died, leaving a will, which contains the following clause: "It is my will that three thousand dollars be paid to Joseph Parke, to be invested in United States gold bearing bonds for the use and benefit of my sister, Jane Thompson, and her minor son, Thos. P. Thompson, the interest arising from said investment to be paid by the trustee to my sister and her son annually for their support and maintainance, and in case of death of either of said beneficiaries before the son, Thomas P. Thompson, shall attain his majority, then the surviving one shall be entitled to have and enjoy the entire amount of said money."

Jane Thompson afterwards intermarried with Enoch Carr, and died on the 20th of August, 1879, leaving her

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son, Thomas P. Thompson, surviving. He had attained his majority sometime before the decease of his mother. The trustee who asks for a construction of the will, maintains in his petition, that as the contingency provided for did not happen, the legacy has lapsed, and is now vested in the brothers and sisters of the testator, whose names are recited by him, but not included as parties to the suit. The public administrator of Johnson county in charge of the estate of Jane Carr deceased, claims one-half of the fund. Thomas P. Thompson, the surviving legatee claims one-half of it, and concedes the other half to his mother's administrator. D. H. Buck the appellant claims the whole fund, as assignee of both legatees. His position is antagonistic to that of the trustee in the construction of the will. He necessarily contends that the legacy did not lapse, but remained vested in the legatees from whom he holds an assignment. Both Thos. P. Thompson and Mrs. Carr's administrator put in issue the binding effect of the assignment. They plead a state of facts tending to impeach its validity and ask to have it annulled. The assignee, in his replication, denies the facts relied on by them to avoid it.

Most of the oral evidence in the record relates to the assignment.

The court in its decree, construing the will, declared that the legacy had not lapsed, holding that Jane Thompson and Thos. P. Thompson took a vested interest in the fund, upon condition that, if either died before Thomas P. Thompson became of age, then the fund should become the property of the other. The assignment to Buck was set aside, and the purchase money paid thereon, in the sum of \$169, was ordered to be returned to Mr. Buck from the trust fund. The trustee was ordered to pay one-half of the fund to Thos. P. Thompson, and the other half to the administrator of Mrs. Carr. From this decree Buck alone has appealed. The trustee who contended that the legacy lapsed, by not appealing, necessarily accepts the decree, and must abide by it. The construction of the will contended for by

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Buck, which denies a lapse of the legacy, and regards it as remaining to the legatees was decided in his favor. The decree of the lower court on this point is final, and is not involved in the appeal which brings the record before us.

The only question contained in this appeal involves the validity and binding effect of the assignment, and this is a question of fact, which the court below decided against the appellant. I have examined the evidence bearing on this issue, and although it is apparently conflicting in substance and weight, it supports the decree. It appears from the evidence that the legatees were unfamiliar with matters of business, and that confidential relations existed between them and the trustee, to whom they resorted for advice and friendly counsel; that the trustee had entertained, and expressed an intention of buying the interests of the legatees and that pending negotiations, to that effect, he had negligently if not designedly, permitted them to remain in ignorance of the amount and actual condition of the fund entrusted to him under the will; that the controverted assignment was made to Mr. Buck, who was his business partner and that it was effected under circumstances strongly indicating that Mr. Buck was acting in behalf of the trustee, who could not safely purchase in his own name; that the legatees were in straightened circumstances at the time, and were impressed by the trustee with the belief that the failure of the bank in which the fund had been deposited might result in a loss of the fund. The attitude of the trustee in this proceeding does not contribute a very favorable impression as to his conduct towards his beneficiaries. He favors giving the fund over to parties whom he does not include in his suit, thus making a plea for persons who do not come forward to make one for themselves. After the decision of the lower court, from which he does not appeal, he submits in the appellate court a brief to overturn the decision which is binding upon him as final. The same attorney who acted as counsel for the trustee in advising him that he could not safely buy the interests of the legatees,

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acted as counsel for Buck advising him to buy, and drafted the instrument of assignment for him, which was signed by the legatees in the presence of the trustee and assignee.

Without stopping to discuss the import of the facts, surrounding the transaction, I will content myself with saying that the decree of the court on this issue was, in my opinion, just and equitable. Accordingly it is affirmed. All concur.

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NEEDLES V. BURK, *Appellant*.

1. **Minor Child, Acts of:** FATHER NOT RESPONSIBLE FOR. A father is not responsible for the negligence or willful wrong of his minor child.
2. **Mistake of Law:** MISREPRESENTATIONS: RECOVERY BACK OF MONEY PAID. Where a minor child sets fire to and burns property of another, and the father, in ignorance of the fact that he was not legally liable therefor, pays the loss, he cannot recover it back, but it is otherwise if the father is induced to pay the loss by the fraudulent misrepresentation of the owner of the property that the child did the burning.

*Appeal from Johnson Circuit Court.*—HON. NOAH M. GIVAN,  
Judge.

REVERSED.

*O. L. Houts* for appellant.

Money paid or property delivered under a mistake of law, cannot be recovered. Bishop Cont., § 144; *United States Bank v. Daniels*, 12 Pet. 32; *Shotwell v. Murry*, 1 Johns. Ch. 512; *Clark v. Dutcher*, 9 Cow. 674; *Mowatt v. Wright*, 1 Wend. 355; *McCarter v. Teller*, 8 Wend. 267; *Pinkham v. Gear*, 3 N. H. 163; *Claffin v. McDonough*, 33 Mo. 412; *Hendricks v. Wright*, 50 Mo. 311; *Mutual Savings Inst. v. Enslin*, 46 Mo. 200; *Daily v. Jessup*, 72 Mo. 144.

Money paid under a mistake of facts can be recovered, but the facts mistaken must be material, such as would have given rise to a legal obligation. And not such as only affect the motives or policy of the party paying. Bishop on Cont., § 249, bottom p. 84; 1 Parsons on Cont., (6 Ed.) side p. 466, bottom 489, and cases cited; *Elting v. Scott*, 2 Johns. 157. Money paid after investigation upon a claim set up in good faith, but which turns out to be unfounded, cannot be recovered. *McArthur v. Luce*, 43 Mich. 435; *Mowatt v. Wright*, *supra*; *Bisbie v. Lemlie*, 2 East 470; Kerr on Fraud and Mistake, 403, 404. If there is no evidence to support the verdict, it cannot stand. Reference by counsel in closing argument to facts outside the record, will work a reversal of judgment.

J. M. Crutchfield for respondent.

(1) To preclude a party from recovering a payment made under a mistake as to his liability, it must appear that it was made with a full knowledge of all the facts, and under circumstances repelling all presumption of fraud or imposition. 2 Kent's Com., (10 Ed.) p. 682, side p. 491; 1 Parsons' Cont., (5 Ed.) p. 466, side p. 466; *Natcher v. Natcher*, 47 Pa. St. 496; *Siliman v. Wing*, 7 Hill 159. (2) Payments made by a party under a mistake as to his liability, can be recovered where the circumstances are such that it would be inequitable or unconscientious for defendant to retain it. *Kelly v. Solari*, 9 Mees. & Wels. 54; 2 Smith's Leading Cases, p. 543; Broom's Leg. Max., 177, 237; 3 B. Mon. 513; *Bize v. Dickenson*, 1 T. R. 285; *Columbus Ins. Co. v. Walsh*, 18 Mo. 229; *Griffin v. Townsley*, 69 Mo. 13; *Foster v. Kirby*, 31 Mo. 496. (3) One who is injured by his mistake of fact, does not lose his remedy, because he mistook the law also. Mistake of both law and fact is a ground for recovery. 3 Parsons on Cont., (5 Ed.) p. 399, side p. 399; *King v. Doolittle*, 1 Head (Tenn.) 77; *Jeffs v. York*, 10 Cush. 392; *Brown v. Sawyer*, 1 Aik. (Vt.)



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130; *Lodge v. Boone*, 3 H. & J. (Md.) 218. (4) Payments procured by false representations or conduct, may always be recovered by the party paying. 2 Parsons on Cont., (5 Ed.) pp. 785, 786; *Magoffin v. Muldron*, 12 Mo. 512; *Gibson v. Stephens*, 3 McLean C. C. 551; *Hinsdale v. White*, 34 Vt. 558; *Reynolds v. Rochester*, 4 Ind. 43.

HOUGH, C. J.—The plaintiff sues the defendant to recover back from him the value of certain property which he alleges he delivered to the defendant upon representations made by him to the plaintiff, that the plaintiff's infant son had carelessly and negligently set fire to and burned defendant's barn, of the value of \$600, and upon the further representation that the plaintiff was liable for said damage, and that defendant's neighbors all regarded him as liable, and were urging him, the defendant, to sue plaintiff therefor; that being ignorant whether or not his infant son had set fire to and burned defendant's barn, and, also, of his rights and liabilities in the premises, and relying upon the representations, so made to him by the defendant, which representations were made by the defendant without knowing them to be true, and which were, in fact, untrue, and which were made for the purpose of obtaining from the plaintiff his said property, plaintiff delivered said property to the defendant in payment of said supposed liability. There was a second count for work and labor which requires no notice at our hands.

There is testimony tending to show that the plaintiff's infant son carelessly lighted a match in or near the barn, and accidentally dropped it where there was some hay which became ignited and caused the burning of the barn, and it is extremely doubtful whether there is testimony enough in support of any other theory to warrant a finding that the plaintiff's son did not burn the barn, as alleged by him. The testimony is irreconcilably conflicting as to whether the defendant made any representations whatever, innocent or fraudulent, to the plaintiff about his son having burned

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the barn. Both plaintiff and defendant and their families were present at the place of the fire, immediately after it occurred, and all the facts and circumstances attending the origin of the fire, so far as they were known, were equally well known to both parties, long before the payment was made by the plaintiff to the defendant. These facts were the basis of much discussion and inference, and the testimony tends to show there was much neighborhood talk upon the subject, and that some of the neighbors suggested a suit, and some a settlement. The court instructed the jury that, in order to a recovery, it devolved upon the plaintiff to show that his son did not burn the barn, but that he believed he did burn the barn, and that he was liable therefor, when he parted with his property, and that he was induced so to believe by the representations of the defendant, and that such representations were untrue. An instruction, asked by the defendant and refused by the court, required the jury to find, also, that the representations of the defendant were fraudulently made. While it is not our province to deal with the facts, further than to see that there is testimony enough to warrant a submission of the issues raised to the jury, we feel constrained to remark that we cannot escape the conclusion that the chief mistake made by the plaintiff was, in supposing himself to be civilly liable for his son's negligence.

It is settled in this state that a father is not responsible for injuries inflicted through the negligence or willful wrong of his minor child. *Baker v. Halldeman*, 24 Mo. 219. The plaintiff, therefore, was not liable to the defendant, Burk, for the value of his barn, even though it had been set on fire by the plaintiff's son. If the plaintiff's son had fired the barn, and in consequence thereof, but in ignorance of the fact that he was not legally liable therefor, the plaintiff had paid the defendant the amount of his loss, it would not be pretended that he could recover it back. But it is contended that, in addition to the mistake of law made by the plaintiff, he was induced by the misrepresen-

tations of the defendant to believe that his son did fire the barn, and that, as this belief on his part caused him to pay the defendant the sum claimed, it constitutes such a mistake of fact as entitles him to recover back the sum paid.

There can be no question that where money has been paid under a mistake of fact, which causes an unfounded belief of a liability to pay, it may generally be recovered back, 1 Parsons on Con., 465 (6 Ed.). But it is, also, true that in order to entitle a person to recover back money paid under a mistake of fact the mistake must be as to a fact which, if true, would make the person paying liable to pay the money, not where if true it would merely make it desirable that he should pay the money. *Aiken v. Short*, 1 Hurlst. & N. Exch., 210. So, that if the alleged representation of the defendant to the plaintiff, that his son had burned his barn, was a mere mistake this would not of itself suffice to warrant a recovery. To entitle the plaintiff to recover, it should be shown, not only that the plaintiff's son did not burn the barn, but that the plaintiff was induced by the representations of the defendant to believe that his son did burn the barn, and that defendant did not believe his representations to be true, or knew that they were untrue; in other words, that such representations were fraudulently made. Where money is paid upon the fraudulent representation of a fact which, if true, would create no legal obligation, but would naturally excite emotions of benevolence, sympathy or compassion, and superinduce a sense of moral obligation which prompted the payment it is right and just that the party paying should be entitled to recover back the sum which he has thus been fraudulently induced to pay. If a simple mistake of fact which creates no legal liability, and which is wholly disconnected from any fraud, induce a payment of money to one who is lawfully entitled to compensation, but not from the party paying, while there may be a moral obligation to return the money, such moral obligation cannot be made

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the basis of an implied legal obligation which will sustain an action.

The judgment will be reversed and the cause remanded. All concur.

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THE STATE V. HAYES, *Appellant*.

1. **Practice in Supreme Court: LOST INSTRUCTION.** The Supreme Court will not reverse a judgment because a refused instruction asked on behalf of the defendant is lost or mislaid, and, therefore, omitted from the transcript, it appearing that the other instructions given in the cause, and contained in the transcript, fully covered the law of the case.
2. **Practice, Criminal: MATTERS OF EXCEPTION.** The action of the trial court in overruling challenges of jurors, and improper remarks of counsel, are matters of exception, and can be preserved only in the bill of exceptions.
3. **St. Louis Criminal Court: CHANGES OF VENUE: STATUTE.** Section 19, page 1509 of the Revised Statutes of 1879, relating to applications to a judge of the circuit court of St. Louis in the matter of changes of venue from the St. Louis Criminal Court, and to the mode of procuring such changes of venue, was repealed by section 1877 of Revised Statutes of 1879, and applications for changes of venue from said St. Louis criminal court are now governed by the general law of the State. Overruling *State v. Kring*, 74 Mo. 612, HENRY, J., dissenting.
4. **Constitution of the United States: EQUAL PROTECTION OF THE LAWS.** A law authorizing changes of venue generally throughout the State, but exempting the city of St. Louis from its benefits, would be repugnant to section 1 of the fourteenth amendment to the constitution of the United States, which forbids a state to deny to any person the equal protection of the laws, and the result would be the same, whether such law be passed in the first instance, or whether the deprivation of the same right elsewhere enjoyed and recognized is occasioned by subsequent legislation.

*Appeal from St. Louis Court of Appeals.*

REVERSED.

*James J. McBride* and *C. C. Simmons* for appellant.

The transcript shows that at the close of the evidence defendant asked an instruction, which was refused by the court, and that the defendant at the time duly excepted, but the instruction does not appear in the record, the clerk certifying that it is either lost or mislaid. The appellant is entitled to a review of the case upon a correct record. The trial court erred in denying defendant's proper challenges of jurors for cause. He was entitled to a full panel of qualified jurors before he could be compelled to make his peremptory challenges. *State v. McCarron*, 51 Mo. 27; *State v. Steeley*, 65 Mo. 218; *State v. Degonia*, 67 Mo. 485. The judge of the St. Louis criminal court was disqualified to sit in the cause until the matter raised in the affidavits supporting the application for change of venue had been passed on by some competent tribunal. R. S., § 1877. He was legally disqualified to try said cause. The order calling in Judge Burton was legal under Revised Statutes, section 1877, which repealed all acts inconsistent therewith. *State v. Kring*, 74 Mo. 612; *State v. Houser*, 28 Mo. 233. Judge Burton having assumed jurisdiction of the cause, had sole charge of it, and he alone could make the vacating order. R. S., § 1881; *State v. Daniels*, 66 Mo. 192; *State v. Hopper*, 71 Mo. 425. The order vacating Judge Burton's appointment without notice to defendant was void. *State v. Webb*, 74 Mo. 333. The circuit court's denial of the application for change of venue, did not confer jurisdiction upon Judge Laughlin. Section 19 of the act concerning the St. Louis criminal court, is repugnant to the provisions of the constitution of the United States, article 14, section 1, for it denies to the citizens of St. Louis city charged with crime, the equal protection of the law with other citizens of the State. Said section 19 of the act creating the criminal court of St. Louis, is also repugnant to section 22 of article 2 of the constitution of Missouri, which guarantees in all



criminal prosecutions a speedy and public trial by an impartial jury of the county.

*D. H. McIntyre*, Attorney General, for the State.

The action of the court in overruling defendant's challenges of jurors was not properly excepted to. *Harrison v. Bartlett*, 51 Mo. 170. The order appointing Judge Burton having been made under a void statute, (*State v. Kring*, 74 Mo. 612,) Judge Burton acquired no jurisdiction, and Judge Laughlin lost none. The application for change of venue on account of the prejudice of the inhabitants of St. Louis, was properly made to the circuit court. *State v. Kring*, 74 Mo. 612, 627. The trial court did not err in overruling the application for a panel of jurors from St. Louis county. *State ex rel. v. Laughlin*, 75 Mo. 147. The instructions given by the court covered the whole case, hence the question raised by defendant as to the lost or mislaid instruction, is immaterial. *State v. Jefferson*, 77 Mo. 137

SHERWOOD, J.—The defendant was indicted for murder in the first degree and, on trial had, was convicted of that offence, and there was abundant testimony to support the conviction. He now appeals to this court.

The instructions given covered every phase of the case arising on the facts adduced in the evidence, and left nothing to be desired. This deprives the case of resemblance to *Reid's case*, 67 Mo. 36; for even had the instruction, asked by defendant and refused by the court, been preserved in the bill of exceptions, its refusal would not have authorized a reversal, other instructions fully covering the case having been given. This being true, it must be entirely immaterial whether the instruction was lost or whether preserved.

Regarding the challenging of two of the jurors for cause, there is no such point preserved in the bill of exceptions, the only proper repository for such matters, and, indeed, of all similar matters which rest in, and are based on excep-

tions. The affidavits respecting such challenges cannot, therefore, be noticed. And the like line of remark applies to the supposed unjustifiable utterances by the counsel of the State, when addressing the jury. After so many adjudications on this point, as to the proper method for preserving matters of mere exception, it seems strange that counsel should resort to any other mode than that so frequently pointed out by a long line of adjudication.

The next points for determination present more difficulty and necessitate a discussion of certain statutes of a general character, and others which are local in their nature and operation, relating to changes of venue in criminal causes, and determining whether, in the present case, the former or the latter, should control. At the January term, 1882, the defendant filed his application for a change of venue, based upon the prejudice of the inhabitants of the eighth judicial circuit. This application was supported by the affidavit of the defendant as well as by the affidavits of two other persons, and also by the additional affidavit of the defendant that the judge of the criminal court would not impartially decide defendant's application because of the prejudice of the inhabitants of the eighth judicial circuit. This application was in entire conformity to the provisions of section 1877, R. S., 1879, and resulted in the Hon. Charles G. Burton, judge of the twenty-fifth judicial circuit, being requested by the order of the criminal court to hear the petition for a change of venue and to try the cause. Judge Burton accordingly came and sat in the cause January 30th, 1882, and as the record recites "enters upon the discharge of his duties in respect to hearing said application for change of venue and the trial of this cause; thereupon the hearing of said application for a change of venue and the trial of this cause is by consent of both the circuit attorney and the defendant laid over to Wednesday, February 8th, 1882." On the 2nd day of February, 1882, the opinion of this court in the case of the *State v. Kring*, 74 Mo. 612, having been promulged, Judge Laughlin, the

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judge of the criminal court, believing himself to be acting in conformity with that opinion, and that the opinion therein decides, as it does, that applications for changes of venue on account of the prejudice of the inhabitants of the city of St. Louis must be made to some judge of the circuit court of that city, set aside the order aforesaid, on the ground that there was no authority to make it. Judge Burton thereafter took no further steps in the cause, but Judge Laughlin thereafter took full control of the cause and to this action of Judge Laughlin, the defendant excepted. On the 8th of February, 1882, to which time the cause had been adjourned by Judge Burton, the defendant filed his verified petition in the circuit court of the city of St. Louis for a change of venue, based upon the prejudice of the inhabitants of that city. The circuit court, after hearing testimony in the cause, denied the prayer of the petition. Thereafter, on the 3rd of April, 1882, the defendant made application, verified by his affidavit, to the criminal court, praying for a jury from the county of St. Louis, alleging in his application the prejudice of the inhabitants of the city. This application, being also denied and the defendant excepting, he was put upon his trial in the criminal court, before Judge Laughlin, with the result already announced.

These preliminaries being stated, these questions arise: As to the effect of the application for a change of venue made before the judge of the criminal court; his calling in Judge Burton to sit in the cause; the assumption by the latter of jurisdiction in the cause; the subsequent vacation by the judge of the criminal court of the order requesting Judge Burton to sit; the resumption by the judge of the criminal court of jurisdiction and control of the cause; the legality of the application for a change of venue made before the circuit court, based upon the prejudice of the inhabitants of the city of St. Louis, and the validity of the application made to the criminal court for a jury from the county.

Section 1877, before referred to, provides that "when any indictment \* \* shall be pending in any circuit or criminal court, the judge of said court shall be deemed incompetent to hear and try said cause in either of the following cases: 1st. When the judge of the court in which such case is pending is near of kin to the defendant by blood or marriage; or, second, when the offence charged is alleged to have been committed against the person or property of such judge, or some person near of kin to him; or third, when the judge is in anywise interested or prejudiced, or shall have been counsel in the cause; or fourth, when the defendant shall make and file an affidavit, supported by the affidavit of at least two reputable persons, not of kin or counsel for the defendant, that the judge of the court in which said cause is pending will not afford him a fair trial or will not impartially decide his application for a change of venue on account of the prejudice of the inhabitants of the county or circuit."

It will be observed that this section applies indiscriminately to all courts exercising criminal jurisdiction. It will be further observed that the fourth sub-division of the section disqualifies the regular judge of the court to hear and try the cause upon filing the affidavit which that sub-division requires equally as much as when he is of kin, interested or prejudiced. And from the very nature of the case, a judge of whom it is sworn that he will not impartially decide an application for a change of venue, is incompetent to sit to try such an issue; otherwise he adjudicates upon the question of his own impartiality. And, indeed, it has passed into precedent that the section under discussion imperatively requires the election of a special judge in the first instance, where such an affidavit is made as contemplated in that section. *State v. Greenwade*, 72 Mo. 298. In that case it was also, ruled that it was proper to call in the judge of another circuit to pass upon an application for a change of venue, based upon the prejudice of the inhabitants, when accompanied by an affidavit based on the

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fourth sub-division of the section aforesaid. And in *Kring's case* it was held that an application based upon the prejudice of the judge of the criminal court was properly presented to the judge of that court, and that the judge of that court in proper circumstances was fully authorized to call upon the judge of another circuit to sit in the case when satisfied that no competent person would be elected as a special judge. The judge of the criminal court being thus rendered incompetent to sit in the case at bar, he lost his jurisdiction when the order requesting Judge Burton had been complied with, and the latter had entered upon the discharge of his duties. This view should accomplish the reversal of the judgment, and is bottomed on the ground that all proceedings had before Judge Laughlin, after Judge Burton has assumed jurisdiction, were *coram non judice*.

It is but a necessary corollary from the foregoing, that judge Burton still retains the jurisdiction with which he was clothed by the order of the criminal court. Section 1881, R. S., 1879, provides that where the judge of another circuit is called in "he shall, during said trial, and in relation to said cause possess all the powers and perform all the duties of a circuit judge at a regular term of said court, and may adjourn the case from day to day or to some other time, as the exigencies of the case may require." Section 1879, R. S., makes similar provisions in respect to a special judge, and this court has ruled, in a case not yet reported, that a special judge, when once invested with powers as such, retains them until the termination of the cause.

It now remains to discuss whether the application for a change of venue, on account of the prejudice of the inhabitants of the circuit was properly presented to the circuit court. It would seem to follow, that, if the ruling in *Greenwade's case* be correct, and if section 1877 means just what it says in reference to "any indictment \*"

\* pending in any circuit or criminal court," and if the order calling on Judge Burton to sit in the cause was valid, as



already determined, that the application for a change of venue based on the prejudice of the inhabitants should have been made to him, just as it would certainly have been thus made had the cause arisen outside of the city of St. Louis, and he had been called to sit. This must be true or else it must be true that Judge Burton was properly called in to hear an application for a change of venue, which he was powerless to pass upon when presented. I am unable to discover any substantial reason why the same legal effects and consequences should not follow from calling in a judge from another circuit to sit in the criminal court of St. Louis as would undoubtedly follow were such a judge called upon to preside in a criminal cause in any other quarter, or court of this state.

In *Kring's case* a ruling contrary to this view was made, and as I now conceive that ruling incorrect, I desire to examine the foundations upon which that ruling is supposed to rest. Prior to the act of 1877, which, according to the ruling in *State ex rel Harris v. Laughlin*, 75 Mo. 147, made the city of St. Louis the eighth judicial circuit, and placed the county of St. Louis, together with other counties, in the nineteenth judicial circuit, the city and county of St. Louis constituted the eighth judicial circuit, and were governed by certain peculiar local laws, which, while they differed from the general laws pertaining to changes of venue, whether because of the disabilities of the judge or the prejudice of the people, gave the applicant for a change of venue an equivalent, which was supposed to fully secure to him a fair and impartial trial, as much so as those methods of procedure authorized by the general law, which prevailed in other portions of this state. The provisions of the local law referred to, first appeared in the act of February, 1849, and transferred causes where the judge of the criminal court was incompetent to sit to the common pleas court, and forbade a change of venue to any other county on account of the prejudice of the inhabitants of either city or county, but provided a venire should issue to

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the city or county in accordance as prejudice might be shown to exist in either.

After the common pleas court was abolished these provisions were transferred to the circuit court, and with immaterial changes, so far as concerns the present investigation, are to be found in sections 16, 17 and 18, R. S., 1879, pages 1508 and 1509. Section 19 on the latter page never constituted a part of the act creating or organizing the criminal court. In the revisions of neither 1855 nor 1865 is that section treated as forming part of the law pertaining to the organization of the criminal court, but it seems to have been improvidently inserted in the revision of 1879, under the impression that it properly belonged to that assemblage of local laws, pertaining to the city of St. Louis, entitled the criminal court. In the case of the *State ex rel Harris v. Laughlin*, it was ruled that section 18, cited above, which corresponds with section 3 of the act of 1849, and provided for a venire, as occasion might demand, from either the city or county of St. Louis, where prejudice of the inhabitants existed, was abrogated by the act of 1877, dividing the state into judicial circuits and constituting the city of St. Louis the eighth judicial circuit. This law and this ruling cut off all opportunity for a person indicted in the criminal court of St. Louis from having any venire which should obtain for him, as was formerly provided, an impartial jury from a locality unaffected by prejudice against him. In *Kring's case* it was ruled that section 16, *supra*, which forbade changes of venue on account of the prejudice or other disability of the judge of the criminal court, and provided for the transfer of such causes for trial to the circuit court, was repealed by section 1877, *supra*, and section 1878 next thereafter, because totally repugnant to those sections of the criminal code. And it was well said in that case that "to give those sections full force in their application to all courts having criminal jurisdiction would be impossible, if the application for a change of venue on the ground of incompetency of the judge had to

be made to the judge of the circuit court." But, it was not observed in that case that the observation just quoted would apply with equal force and significance to the fourth subdivision of section 1877, *supra*, which evidently relates, as to one of its clauses, to an affidavit supplemental to an ordinary application for a change of venue based upon the prejudice of the inhabitants of the county, or circuit, as provided for in sections 1856, 1857, 1858 and 1859 of the same chapter. In a word, no greater repugnancy could exist between some portions of sections 1877 and the local law, than between other portions of the same section and that same local law; therefore for like reasons, section 19 aforesaid must be regarded as also annulled by the general and repugnant provisions of the criminal code, even should that section be regarded as forming any portion of the law relating to the organization of the criminal court. That section, in express terms, provided that there shall be no change of venue from the criminal court except as therein provided, and then made provision that for any of the causes for which changes of venue are now allowed by law a party might present to the circuit court of St. Louis his application for a change of venue, based upon any one of the causes allowed by law for such a change, etc., whereupon it should be the duty of the circuit court, upon hearing testimony, to either grant the application, and order the cause transferred to that court, or, on being satisfied that the alleged cause did not exist, to dismiss the application at the cost of the applicant. In *Kring's case*, it was also decided that so much of section 19, just cited, as required application for changes of venue, on account of the incompetency of the judge of the criminal court, to be made to the circuit court, was repealed by reason of repugnancy to the provisions of the criminal code, as aforesaid; but at the same time it was also ruled in that case that so much of that section as required applications for changes of venue from the criminal court to be made to the circuit court, on account of the prejudice of the inhab-

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itants, was retained, and that the jurisdiction of that court on that point remained as it was, prior to the enactment of the criminal code.

This ruling, for the reasons heretofore given, I regard as erroneous, and will proceed to give some additional reasons therefor; reasons touching questions of statutory and constitutional construction. But before proceeding to state these reasons, it may be said that while section 18 of the act organizing the criminal court remained in force, no necessity existed for applying to the circuit court for a change of venue based on the prejudice of the inhabitants, whether of county or city, because a venire issued to either city or county, as emergency demanded, would have accomplished all that could have been done, and more than could have been done by a change of venue, or rather transfer of the cause to the circuit court; and it would be most unreasonable to suppose that the legislature would require a party to go to the circuit court for a change of venue based upon the prejudice of the inhabitants, when the only remedy which at that time could have been granted him in that regard, was only obtainable by a venire under the provisions of section 18. But a more serious objection still occurs to the ruling mentioned, as to section 19; it is this: Since the ruling in the *State ex rel. Harris v. Laughlin*, before cited, declaring section 18 aforesaid abolished, a ruling which, in justice to the learned judge who delivered the opinion of the court in *Kring's case*, it is scarcely necessary to say, was not then anticipated, the application to the judge of the circuit court for a change of venue, because of the prejudice of the inhabitants, would be utterly barren of results, even if successful, resulting only in a change of forum, a compulsory change of judges instead of a change of venue, and leaving the cause to be tried by a jury from the very locality where the prejudice complained of, is ascertained and declared by the solemn judgment of the circuit court to exist. Could any child's game of cross-purposes be more ludicrous? The idea is not to be tolerated

for a moment that the legislature intended any such farcically absurd result. For "it is not to be presumed that the legislature intended, that the results of its deliberate act should prove of no effect, or in other words, a nullity. Hence another rule of construction is, that no statute should be so construed as to produce such an effect." Smith's Com., § 488. By an absurdity or nullity is meant not only that which is physically impossible, but also that which is morally so, and that is to be regarded as morally impossible, which is contrary to reason, or in other words, which could not be attributed to a man in his right senses. *Ib.*, §§ 486, 518.

Taking this view of the matter, it should be held that by reason of the ruling in *State ex rel. Harris v. Laughlin*, and the enactment of 1877, *supra*, which abrogated section 18, and by reason of the general provisions of the criminal code being repugnant to section 19 aforesaid, the whole of that section must be regarded as repealed and abrogated, leaving no shred or patch of jurisdiction vested in the circuit court, and leaving the rights of a defendant in a criminal cause, when indicted in the city of St. Louis, to be governed by the provisions of the general law in relation to changes of venue. And in respect to section 1999, it may be said that it may refer to some future legislative enactments, (*Ex parte Allen*, 67 Mo. 534;) it does not necessarily refer to section 19, and "continue in force the jurisdiction of the circuit court on applications for changes of venue made on account of the prejudice of the inhabitants," and if it should be held to do this because of making an exception as to those courts exercising criminal jurisdiction when an "other or different provision is made by law," then for the very same reason, and by the same method of construction, section 16 of the local law, relating to the criminal court of St. Louis, and indeed all the provisions of that local law, except section 18, should be held as still intact and in full force, notwithstanding the totally repugnant provisions of section 1877, relied on in *Kring's case*.



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Any other conclusion which holds that the portion of section 19, before mentioned, is still in force, would cause such portion to be violative of section 1 of the fourteenth amendment of the constitution of the United States, which forbids that any state "deny to any person the equal protection of the laws." Doubtless the legislature might repeal all the provisions of the general law relating to changes of venue in criminal causes, and there would be no redress. But no one would claim that the legislature could pass a law for changes of venue in such causes which should be general throughout the state, with a proviso that none of its benefits should be enjoyed by the citizens of St. Louis, and the effect is precisely the same whether such a law be passed in the first instance, or whether by subsequent legislation, the same deprivation of the right elsewhere enjoyed and recognized occurred. It is needless to urge upon those who have long been engaged in criminal trials the insidious nature of popular prejudice, especially in closely congregated communities, nor to urge upon them the importance of the right and of the protection which secures exemption from such a danger. Against the bias of the judge the law affords many protections. His bias may measurably be neutralized by properly conducting the cause before him; his rulings may be reviewed and corrected in an appellate court: but who can be able to withstand popular prejudice, or who defend his client against its baleful influence? Impalpable as the air we breathe, yet deadly as the malaria of the Pontine marshes, it penetrates with its poisonous exhalations the innermost recesses of the jury room.

To guard, as far as possible, against an evil of such magnitude, laws allowing changes of venue have been passed, and this state has fully recognized the danger from such a source, and so far as human agencies may operate through general laws, made provision against it. Under that clause of the amendment referred to, the state has no authority to recognize such a right, provide for its protec-

tion and its exercise all over its boundaries, and yet refuse to provide any means for its exercise in one isolated and excepted locality. Under the construction I have given to the different statutory provisions no such infraction of the constitution will occur.

For the reason that Judge Laughlin had no jurisdiction to try the defendant, the judgment should be reversed and the cause remanded. Judges Norton and Ray concur; Hough, C. J., concurs in the result, and Henry J., dissents.

HENRY, J., Dissenting.—Not concurring in the views expressed in the foregoing opinion, by which a case is overruled recently decided by this court, in which all the judges concurred, I feel it due from me, in view of that fact and of the important questions involved, to state the grounds of my dissent.

In the act establishing the criminal court of St. Louis, and in all the legislation on the subject, the purpose of the legislature to deny to persons accused of crime in that city a change of venue is too clear for controversy. In section 18 of the act establishing the St. Louis criminal court, it is declared that: "It shall not be lawful for a person indicted in the city of St. Louis to obtain a change of venue to any other county." In section 19 it is declared that, "No change of venue shall hereafter be allowed from the St. Louis criminal court, except as herein provided." But it is strenuously contended that the provisions of that act have been repealed by those of the general statutes; and the section chiefly relied upon in support of that view is 1877, which declares that in any criminal cause, pending in any circuit or criminal court, if the defendant make an affidavit that the judge before whom it is pending will not grant him a fair trial, or decide impartially his application for a change of venue, based upon the prejudice of the inhabitants, such judge shall be incompetent to hear or try said cause. The argument is that this latter clause of the section, in connection with the first, is a recognition of the

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right of the accused to make his application for a change of venue to the criminal court and not to the circuit court as provided in the act establishing the criminal court of St. Louis, and that it operates as a repeal of those sections of the act establishing that court which relate to changes of venue. It is to be borne in mind, in construing that section, that applications for changes of venue in this state, elsewhere than in St. Louis, when this section was created, were made to the courts in which indictments were pending and the latter clause of the section was added in order that the accused might have an impartial decision of his application for a change of venue based upon the prejudice of the inhabitants, but so far as the criminal court of St. Louis was concerned the law had already provided that applications for change of venue, based upon that ground, should be made, not to the judge of the criminal court, but to the circuit court. It strengthens the view that it was not intended to repeal that law, that while section 1856 provides for a change of venue in any criminal cause pending in the circuit court to another county, and section 1999 applies all the provisions of the criminal code applicable in terms to the circuit court to all courts of record having criminal jurisdiction, it expressly excepts those courts for whose government a different provision of law was then in force. In the latter clause of section 1877 criminal courts were named, because there were other criminal courts in the state to which the special provisions of the act establishing the St. Louis criminal court were not applicable, and in which applications for changes of venue for any of the causes enumerated in the statute were made to those courts instead of the circuit court.

It is much clearer from the exceptions in section 1999, that there was no purpose to repeal the provisions of the act establishing the criminal court of St. Louis than that from the phraseology of section 1877 it was the intent to repeal them. It does not repeal them in terms, no no-

tice of that act is taken in section 1877. If repealed, it is, by implication, against an express provision which seems to have been adopted for the purpose of preserving the mode of procedure in the St. Louis criminal court, an implication against the declared policy of refusing changes of venue in the city of St. Louis, which has been repeatedly declared since the organization of the criminal court of St. Louis. But that the legislature did not, by any section of the criminal code, intend to repeal so much of the act establishing the criminal court of St. Louis as relates to changes of venue, is made clear by section 3158, which expressly declares that "all acts and parts of acts especially applicable to the city of St. Louis, and in force at the commencement of, or passed during the present session of the general assembly and not repealed by some act of the present session, shall be and the same are continued in force, according to their respective provisions and limitations, and shall be published as an appendix to the Revised Statutes."

This court held in the *Kring case*, all the judges concurring, that applications for changes of venue, on the ground of the prejudice of the inhabitants, should be made to the circuit court, and I am entirely satisfied that if any error was committed by this court in that adjudication it was in holding that the judge of the criminal court may call another judge when the accused applies for a change of venue on account of his disqualification. But without going over that ground again, being fully satisfied with the conclusions reached in the *Kring case*, we come now to the question of the unconstitutionality of the act, denying the right to a change of venue in the city of St. Louis, while, by the general law, to every one accused of crime elsewhere in the state, it is granted. The act denying the right is not unconstitutional, because it only denies, in the territory to which it applies, a right which no one accused of crime has in this State, except by law. The constitution does not guarantee it. It declares that he shall have a speedy public trial by an impartial jury of the county. Awarding a

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change of venue is a matter of grace and favor and not of constitutional right, and if either the law denying it in St. Louis or the general law conferring the right elsewhere in the State be unconstitutional, it must be the latter, and if so, the result is, not that the accused in St. Louis shall have a change of venue, but that no one indicted can have it, anywhere in the State. In other words, if the general law has no application to St. Louis, this court cannot extend it over that territory on the assumption that the legislation, denying the right to a change of venue in St. Louis is unconstitutional. If the general law had been applicable throughout the State, and a law had been enacted repealing it, so far as it extended to the city of St. Louis, the constitutional question would be properly before us, but if the general law in the revision of 1879, is not applicable to the city of St. Louis, one indicted in the city can have no change of venue, whether the general law, because not applicable to that city, is constitutional or not.

It is conceded, in the opinion of the majority of the court that the legislature may, in the city of St. Louis, substitute the right to a jury from the county, for the change of venue provided for the balance of the State. It seems to me, with due respect for my associates, that this is yielding the entire ground of their argument.

The right to a change of venue is not predicated upon the idea that an impartial jury cannot be obtained from a prejudiced community, but upon the ground that such prejudice will prevent a fair trial, even by an impartial jury, sitting in the midst of such community. Under our decisions it is not difficult, at least not impossible, to get an impartial jury, or a jury competent to try the cause, no matter how great the prejudice of the inhabitants of the county. The substantial value of a change of venue lies in the fact that it removes the trial from such surroundings as would likely unduly influence a jury, impartial when selected. Under the special provisions relating to the criminal court of St. Louis, the accused in that city had



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the option to get a jury from the county or have a change of the forum, in lieu of a change of venue. This court, in an opinion from which I dissented, in the case of the *State ex rel. v. Laughlin*, struck down the former right, and left only the barren, fruitless right of a change of forum, and for this court to extend the general law over the city of St. Louis, on account of the anomalous condition of the law in relation to changes of venue, produced by judicial adjudications and faulty legislation on the subject, were to legislate and not judicial determine.

If the legislature intended the general law on the subject to apply to the city of St. Louis, then the controversy is at an end. If it did not so intend, it is not the province of this court to extend the general law over that territory.

I am of the opinion that Judge Laughlin properly construed the *Kring case*, and do not agree to reverse the judgment on the ground that the court erred in rescinding the order calling Judge Burton to preside at the trial of Hayes.

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VALLEAU V. NEWTON COUNTY, *Appellant*.

1. **County Warrant: LIMITATION.** An action on a county warrant is not barred by the statute of limitations if commenced within ten years after the cause of action accrued.
2. ———: **WHEN PAYABLE FROM GENERAL REVENUE FUND, ALTHOUGH DRAWN ON SPECIAL FUND.** The payment of a county warrant can be enforced against the general revenue fund, although drawn on a special fund, if the county has used the latter for the payment of demands not properly chargeable to it, and thereby diverted it from the payment of the warrant.

*Appeal from Jasper Circuit Court.*—HON. M. G. MCGREGOR,  
Judge.

**AFFIRMED.**

C. W. Thrasher for appellant.

The lower court erred in overruling defendant's motion to strike out from plaintiff's amended petition the allegations as to a contract for building a jail. *Otis v. Bank*, 35 Mo. 128; 1 R. S. 1879, § 3529; *Kinney v. Miller*, 25 Mo. 576; *Payton v. Rose*, 41 Mo. 267; *Garner v. Railroad Co.*, 34 Mo. 235. The lower court also erred in sustaining plaintiff's demurrer to defendant's plea of the statute of limitations. Gen. St., p 747, § 10; R. S., § 3230; *Phelps Co. v. Bishop*, 68 Mo. 252. The warrant sued on in this case being payable out of the internal improvement fund of Newton county, the plaintiff is not entitled to a general judgment against said county on this warrant. *Pettis Co. v. Kingsbury*, 17 Mo. 479; *State ex rel. Zimmerman v. Justices of Bollinger Co. Ct.*, 58 Mo. 475, 478; *Campbell v. Polk Co.*, 49 Mo. 214; *Moody v. Cass Co.*, 74 Mo. 307; *State ex rel. Watkins v. Macon Co. Ct.*, 68 Mo. 29; *Campbell v. Polk Co.*, 76 Mo. 57. The court erred in admitting the evidence offered by the plaintiff and objected to by defendant. A plaintiff cannot sue upon one cause of action and produce evidence in support of and recover on another cause of action. *Clements v. Yeates*, 69 Mo. 623; *Ensworth v. Barton*, 60 Mo. 511; *Eyerman v. Mt. Sinai Cemetery Asso'n*, 61 Mo. 489; *Huston v. Forsythe Scale Works*, 56 Mo. 416. The plaintiff's amended petition does not state facts sufficient to constitute a cause of action. *Campbell v. Polk Co.*, 76 Mo. 62; *Moody v. Cass Co.*, 74 Mo. 308. If the plaintiff in his amended petition filed herein added any new cause of action, such new cause of action was subject to the statute of limitations at the time of filing said amended petition. Bliss on Code Plead., § 429; Moaks Van Santvoord's Plead., 838; *Sweet v. Jeffries*, 67 Mo. 420; *Butcher v. Death & Teasdale*, 15 Mo. 271; *Lumpkin v. Collier*, 69 Mo. 170; *Carson v. Cummings*, 69 Mo. 325; *Clements v. Yeates*, 69 Mo. 625; *Ensworth v. Barton*, 60 Mo. 511;

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*Thompson v. School District*, 71 Mo. 495. A plaintiff, by filing an amended petition in a cause, abandons all former petitions before filed by him in the same cause. *Ticknor v. Voorhis*, 46 Mo. 110; *Woolfolk v. Woolfolk*, 33 Mo. 110; *Skinner v. Hutton*, 33 Mo. 244; *Basye v. Ambrose*, 28 Mo. 39. The statute of limitations applies to counties same as persons. *School District of St. Charles Tp. v. Goerges*, 50 Mo. 194; *County of St. Charles v. Powell*, 22 Mo. 525; *Dillon Munic. Corp.*, §§ 406, 412, and notes; *Baker v. Johnson Co.*, 33 Iowa 151; *Underhill v. Trustees*, 17 Cal. 172. If the plaintiff had stated his cause of action in said last amended petition on the contract with Newton county to build a jail, the statute of limitations would have been a complete bar to his recovery. He certainly cannot stand in a more favorable position on the evidence without such pleading. The plaintiff is charged with full notice of the law governing the powers and duties of the county court of Newton county, and if the warrant sued on was issued without authority of law and was void, the plaintiff was a party to the wrong and cannot call upon the county to reimburse him for his losses. *Walcott v. Lawrence Co.*, 26 Mo. 272; *Reardon v. St. Louis Co.*, 36 Mo. 560; *Ray Co. v. Bently*, 49 Mo. 242; *Steines v. Franklin Co.*, 48 Mo. 167; *State v. University*, 57 Mo. 178; *Barton Co. v. Walser*, 47 Mo. 189; *Bigelow on Fraud*, 337.

*J. C. Cravens*, with *Jos. Cravens* and *Geo. Hubbert* for respondent.

The "Internal Improvement Fund" being a special fund arising from the sale of 500,000 acres of land granted to the state by an act of congress, could be applied or drawn on as such only for the purposes of "Internal Improvements," such as the building of bridges and construction of roads and highways. 5 U. S. Stat. at Large, p. 455; 2 R. S. of Mo. 1855, p. 991. The building of a jail is not an "Internal Improvement" within the meaning of

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these acts. Laws of Mo. 1858, 1859, p. 381. That a jail is simply a necessary county building, and its erection fully provided for, and is to be paid out of the general revenues of the county is clearly shown by the law in force at the time. 1 R. S. of 1855, p. 499. The court did not err in refusing to sustain defendant's motion to strike out part of amended petition. *Valleau v. Newton Co.*, 72 Mo. 593; *Kingsbury v. Pettis Co.*, 17 Mo. 479; s. c., 48 Mo. 207. The liability of the defendant is clearly shown by the facts and circumstances in this case. *Valleau v. Newton Co.*, 72 Mo. 596. The defense of the statute of limitations was not made out. *Lottman v. Barnett*, 62 Mo. 170; *Logan v. Barton Co.*, 63 Mo. 336. The facts of the case present no element of estoppel against plaintiff. Bigelow on Estop., (2 Ed.) 42. The supreme court should not reverse causes for errors not materially affecting the merits of the action. R. S. 1879, § 3775; *Orth v. Dorschlein*, 32 Mo. 386; *Hunter v. Miller*, 36 Mo. 143; *Miller v. Newman*, 41 Mo. 509.

HENRY, J.—This cause was once before in this court on writ of error, and the only matter then considered was the action of the circuit court in sustaining a demurrer to the amended petition, the same now before us, which counsel for appellant again insists is bad for the reasons urged on the former occasion. The petition is incorporated in the opinion then delivered, and the case is reported in 72 Mo. 593. We adhere to the ruling then made. On a retrial of the cause plaintiff had judgment from which defendant has appealed. Many of the questions discussed by counsel in their briefs were settled by the former adjudication, and we shall only consider those not there determined. Appellant's counsel contends that the action was barred because not commenced within five years after the right of action accrued. Section 3229 and not section 3230 is the one which governs. The suit is one in writing for the payment of money, and ten years is the limitation prescribed in such cases. The amended petition does not state a cause of ac-

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tion other than that upon the warrant. The facts alleged in relation to the action of the county court with regard to the internal improvement fund are only stated in order to show why the warrant sued on is payable out of the general revenue fund.

The evidence conclusively shows that after contracting for the materials and work which plaintiff furnished and performed, the county court borrowed all of the money on the internal improvement fund and applied it to the payment of demands not properly chargeable to that fund. The petition conformed to the ruling in *Kingsberry v. Pettis county*, 48 Mo. 208, and in this cause when here before. It is not, as counsel insists, a suit where the contract is to furnish the materials for the jail and perform the work done by plaintiff, but a suit upon the warrant alleging facts, showing that, although drawn upon one fund, it is to be regarded as evidence of a general indebtedness payable out of the general fund.

The judgment is affirmed. All concur.

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MACLEOD, *Plaintiff in Error*, v. SKILES.

1. **Practice:** SEVERAL COUNTS: ELECTION. A party cannot complain of having been compelled to elect to stand on one of two counts in his petition, when the one on which he did not elect to stand failed to state a cause of action.
2. **Covenants in Deed:** CONTEMPORANEOUS PAROL CONTRACT INADMISSIBLE TO CHANGE. One who accepts a deed to real estate, with an express covenant therein to warrant and defend the title thereto against the claim of any person whomsoever, save and except the taxes of a certain specified year, cannot afterwards claim that the covenantor, by a parol contract contemporaneous with the deed, agreed to pay the taxes so expressly excepted from the operation of said covenant.



*Error to Jackson Special Law and Equity Court.*—HON.  
R. E. COWAN, Judge.

AFFIRMED.

*Bogges, Cravens & Moore* for plaintiff in error.

The two counts in the petition state separate and distinct causes of action. But conceding that the two counts state but one cause of action, the court erred in compelling the plaintiff to elect on which count he would proceed, and in striking out the other. Bliss on Code Plead., §§ 118, 119, 120, 295, and authorities cited; *Brinkman v. Hunter*, 73 Mo. 172. The second count stated a good cause of action. *Nevidek v. Meyer*, 47 Mo. 600; *Landman v. Ingram*, 49 Mo. 212; *McConnell v. Brayner*, 63 Mo. 461; *Bracket v. Evans*, 1 Cush. 79; *Preble v. Baldwin*, 6 Cush. 549.

*Bryant, Holmes & Waddill* for defendant in error.

The motion to require plaintiff to elect was properly sustained for the reason stated in the motion. The plaintiff was in no way prejudiced by striking out said count. The parol agreement therein alleged was contemporaneous with and merged in defendant's deed to plaintiff, and could not, therefore, be permitted to be proved. *Gooch v. Connor*, 8 Mo. 391; *Robbins v. Ayres*, 10 Mo. 538; 2 Whart. on Ev., §§ 920, 921. The second count failed to state a cause of action, and in addition the evidence failed to prove its allegations. The alleged written contract was executory, and the delivery and acceptance of defendant's deed conveying said land to the plaintiff, abrogated said written contract, and plaintiff's contract thenceforward was contained in the covenants of defendant in that deed, there being no fraud or mistake alleged or pretended. *Kerr v. Calvit*, Walker (Miss.) 115; *Waiver v. Bentley*, 1 Cai. 48; *Hawes v. Baker*, 3 Johns. 506; *Williams v. Hathaway*, 19 Pick. 387; *Crotzer*

*v. Russell*, 9 Serg. & Rawle 78; *Stebbins v. Eddy*, 4 Mason 414.

RAY, J.—The petition in this case contains two counts. The first is in substance as follows: That on April 25th, 1877, plaintiff and defendant made and entered into a contract in writing by which defendant sold and agreed to convey to plaintiff block one in Skiles & Western's addition to the City of Kansas, for the consideration of \$7,200, \$10 down and \$1,990 when the title to the block was shown to be good, and a good and sufficient deed should be made and delivered or tendered by defendant to plaintiff, the balance to be secured by three promissory notes of plaintiff—two for \$1,733.33 each, and one for \$1,733.34, the first two notes maturing at one and two years respectively, and the other at three years, each bearing ten per cent per annum from date, and secured by a deed of trust on said real estate, same to be executed and delivered concurrently with said deed and the payment of said \$1,990, and to bear the same date; subject only to the terms and legal effect of an agreement in writing between said defendant and one Stevenson for the sale and conveyance, by the former to the latter, of part of said real estate which said plaintiff by the terms of said agreement was to comply with and perform, and was to have and receive all moneys due or to become due from said Stevenson; that plaintiff has kept and performed all the terms of said agreement on his part, but defendant has failed, neglected and refused to keep and perform the same on his part in this, that he failed, neglected and refused to furnish an abstract of title to said real estate, or otherwise to show plaintiff that title thereto was good, by reason of which plaintiff was compelled to and did expend \$30 to procure an abstract of title to said real estate; and in this, that he wholly failed, neglected and refused to execute and deliver, or tender and offer to deliver to plaintiff a general warranty deed of said premises, conveying the same to plaintiff; but did tender and deliver to plaintiff a

deed of general warranty in form, but containing an exception therein as to the taxes thereon of and for the year 1877, which said plaintiff refused to accept and did not accept in performance of said written contract; that the State and county taxes on said real estate for the year 1877, and of the city of Kansas, had then been levied and assessed for that year as well as for many preceding years, and the same were then a lien thereon; said State and county taxes for the year 1877 amounted the sum of \$57.35, which defendant has wholly failed, neglected and refused to pay; that plaintiff has been compelled to and paid the same on the 16th day of February, 1878, by reason whereof plaintiff has been damaged in the sum of \$100, for which, with interest, he asks judgment.

For a second cause of action plaintiff states that defendant offered to deliver said deed to plaintiff on or about the 22nd of May, 1877; plaintiff then refused to receive and accept the same in performance of said written agreement, or to pay said \$1,990, or to execute and deliver said notes and deed of trust until said taxes were by defendant paid; thereupon plaintiff and defendant made the following other and further agreement, outside of and beyond the said written agreement, that is to say: That the plaintiff should and would then and there pay the defendant said sum of \$1,990, execute and deliver said notes and deed of trust, and in consideration thereof defendant should and would, out of and with a part of the money so to be paid by plaintiff, pay all the taxes then levied against or assessed upon said real estate, county, State and city. Pursuant to said agreement plaintiff then paid said sum of money and executed and delivered to defendant the said notes and deed of trust; and defendant, pursuant to and as part performance of said agreement, on or about the 22nd of May, 1877, paid all said taxes except only the State and county taxes for the year 1877, amounting to the sum of \$57.35, which he then and ever since has refused to pay. On the 16th day of February, 1878, plaintiff was com-

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pelled to and did pay said taxes, by reason whereof he has been damaged in the sum of \$100, for which with interest he asks judgment.

The answer of defendant was simply a general denial.

At the March term, 1879, defendant filed his motion to require the plaintiff to elect on which count of the petition he would proceed to trial, which motion is in words and figures following :

“Defendant moves the court to order plaintiff to elect on which count of the petition he will proceed, for the reason (1) that the two counts in said petition are inconsistent, in that the first count declares upon the written contract therein referred to as subsisting, whereas the second count is based upon a subsequent parol agreement, which as appears by the petition, was entered into as a substitute for said written contract. (2) Both counts in said petition are for substantially the same cause of action as appears on the face of the petition.

At the September term, 1879, the motion was sustained and the plaintiff elected to proceed on the first count, and the court thereupon struck out the second count, to which action of the court the plaintiff duly excepted. To sustain the issue on his part, the plaintiff at the trial read in evidence the written contract signed and sealed by the parties mentioned in the petition, and which is as follows, to-wit :

“For the consideration of \$7,200, this day paid and secured to be paid to H. H. Skiles, of Kansas City, Mo., by George MacLeod, in the manner hereinafter stated, the said Skiles has this day sold, and by these presents binds himself to convey to said MacLeod lots numbered from one to thirty inclusive, in block one, in Skiles & Western's addition to City of Kansas, county of Jackson, State of Missouri. In consideration whereof said MacLeod hereby agrees and binds himself to pay to said Skiles the sum of money aforesaid, as follows: \$10 this day paid in hand; \$1,990 to be paid so soon as the title to said lots is shown to be good, and a good and sufficient deed therefor is de-

livered or tendered by said Skiles to said MacLeod, balance to be secured by the three promissory notes of said MacLeod, two for \$1,733.33 each, and one for \$1,733.34. One of said notes to mature in one year, one to mature in two years, and the last of said notes to mature in three years, each to bear ten per cent interest from date, and to be secured by deed of trust on said real estate, the same to be executed and delivered concurrently with said deed and the payment of said sum of \$1,990, said deed to be one of general warranty, and said lots to be free of any and all incumbrances; said notes to bear the same date as said deed and deed of trust. It is hereby expressly understood and agreed that said Skiles has heretofore sold and bound himself to convey to one James Stevenson, twenty-four feet off the south side of said lot 16, and given him an obligation for a conveyance thereof, and holds the obligation of said Stevenson for the sum of \$300 therefor, which he has this day assigned and delivered to said MacLeod, who hereby assumes and agrees to perform the obligations of said Skiles above mentioned to said Stevenson."

Plaintiff also read in evidence a deed from Skiles to MacLeod, containing among other things the following express covenant: "The said H. H. Skiles covenanting to and with the said George MacLeod, his heirs and assigns, for himself, his heirs, executors and administrators to warrant and defend the title to the premises hereby conveyed against the claim, of every person whatsoever save and except taxes of 1877." It was then admitted that the taxes on said real estate assessed in favor of said Kansas City and for state and county purposes for several years preceding the date of said deed was at its date due and unpaid. That said deed was delivered as stated in the evidence of R. O. Boggess on the 21st or 22nd of May, 1877; that on the same or following day said Skiles paid all the taxes on said real estate for the year 1877 and all preceding years, except the taxes thereon due the state and county for the year 1877 which he has never paid; that on or about said 22nd



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of May said MacLeod paid said sum of \$1,990, executed and delivered said notes and deed of trust, as required by the written contract, and that on the 16th day of February, 1878, said state and county taxes on said real estate remained unpaid and amounted to \$57.85 and were on that day paid by MacLeod.

There was but one witness in the case, R. O. Boggess, who testified for plaintiff, in substance, as follows: He wrote the said contract read in evidence; the terms of the agreement had all been settled by said Skiles and said MacLeod, Alfred Bury acting agent for said MacLeod—that is when his relations to business began—he was then employed to examine the abstract of title. Said Skiles presented to him for examination an abstract, which, as he then understood, and now remembers, purported to be an abstract of the title to the land on which the addition of Skiles & Western is situated, from the emanation of the original patent from the United States down to the time when said land was laid out into what is known as Skiles & Western's addition, and partitioned amongst the owners thereof, and a part thereof sold to the Kansas Stock Yards Company several years prior to that time; said abstract, as he now remembers, was imperfect, in that it had some defects in the earlier portions thereof, and did not purport on its face to give the title to the real estate described in the said written contract to that time, nor to show anything in regard to taxes, judgments and mechanics' liens which might effect said real estate. He pointed out said defects to said Skiles, demanded a perfect and complete abstract, and refused to undertake to determine upon the validity of the title to said real estate on that abstract. Said Skiles refused to furnish any other, but did offer to refer him to other persons conversant with said title for information in regard thereto. He declined to accept such information in lieu of an abstract, and he declined to act thereon; instead thereof, he demanded a complete abstract of title which said Skiles refused to furnish. Thereupon the witness pro-

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cured such abstract at a cost to the plaintiff of \$30. On examination of such abstract, title to said real estate was found satisfactory, and he undertook to close up said transaction for plaintiff; signified to defendant his readiness and ability to comply with said written agreement on behalf of plaintiff. Defendant then tendered and offered to deliver to him, for plaintiff, the deed read in evidence. This was on or about the 21st or 22nd day of May, 1877. Witness declined to accept said deed for plaintiff, because it did not conform to the terms of said written agreement, and so informed said Skiles, but proposed to receive the same as part performance, as far as it was in accordance therewith, and not otherwise. It was then agreed by said Skiles and the witness, acting for plaintiff, that plaintiff would receive said deed, pay said \$1,990, deliver said notes and deed of trust; that said Skiles would, with the money so paid, pay all the taxes on said real estate, including that in favor of said city, and the State and county taxes thereon, for the year 1877. Witness paid the sum of money, delivered said notes and deed of trust, and received said deed from said Skiles, but refused to surrender said written agreement, because the same had not been complied with and performed, and continued to hold the same. On that or the following day, said Skiles told him he had paid all the taxes on said real estate, save and except the State and county taxes for the year 1877, which he said he could not and had not paid, for the reason that the tax books for that year had not yet gone into the hands of the collector, and showed the witness receipts for all the other taxes. Said Skiles then and there promised to pay the State and county taxes for the year 1877.

The court, at the request of the defendant, gave the following instruction :

The court declares the law to be, that on the pleadings, evidence and admissions, the plaintiff cannot recover.

The questions presented by the record in this case for the decision of this court are, whether or not the court be-

low committed error in requiring plaintiff to elect on which count he would proceed; and in then striking out the other of said counts; and whether or not the court below committed error in sustaining defendant's demurrer to the evidence. Conceding, without deciding, that it was error to require the plaintiff to elect on which count he would go to trial, and upon his election to stand on the first count, to strike out said second count, yet that action of itself furnishes no sufficient reason to warrant a reversal of the cause, unless the merits of the action were materially affected thereby. Rev. 1879, § 3775. If the second count, so stricken out, does not state facts sufficient to constitute a cause of action, the merits of the action could not possibly be affected thereby. It is not sufficient that an error may have been committed, but it must also appear that the party complaining has been prejudiced thereby. 36 Mo. 143; 41 Mo. 509; 32 Mo. 366; *Bellissime v. McCoy*, 1 Mo. 318.

This suit brings us to a consideration of the question whether it is competent for a party, as in this case, to accept a deed for real estate with an express covenant therein to warrant and defend the title thereto against the claim of every person whatsoever, save and except taxes of 1877, and then turn around and show that the covenantor, by a cotemporaneous parol contract agreed to pay the taxes thus expressly excepted by the written contract in the deed so excepted. It is elementary law that upon the execution, delivery and acceptance of a deed or written instrument all prior or cotemporaneous parol stipulations are merged in the deed or writing, and cannot afterward be set up to contradict or vary the same. It is scarcely necessary to refer to elementary authority or adjudged cases to establish so plain and recognized a doctrine as this. The cases referred to in the brief of defendant in error, (*Gooch v. Conner*, 8 Mo. 391; *Robbins v. Ayres*, 10 Mo. 538, and 2 Whart. Ev., §§ 920, 921,) are amply sufficient for this purpose. There may be cases seemingly at variance with this well established rule, but when properly considered, they will be

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found to turn mainly upon questions and principles altogether different from those involved in the case at bar. Such, we think, for the most part, are the cases cited in the brief of plaintiff in error. *Nevidek v. Meyer*, 46 Mo. 600; *McConnell v. Brayner*, 63 Mo. 461, and *Laudman v. Ingram*, 49 Mo. 212. These cases, properly considered, go to the extent that when it is material to show the amount or character of the consideration of a deed, parol evidence, not inconsistent with that named in the deed, may be received. The question now before us, as we think, is not one as to the character or the amount of the consideration, which is clearly and expressly stated in the deed, but one as to the force and effect of an express covenant in the deed, and the admissibility of parol evidence to contradict or vary the same. The covenant in this deed especially saves and excepts the taxes of 1877. The party cannot accept a deed with such a covenant and escape its force and effect by verbal protestations and stipulations to the contrary. If he does not like the deed with such a limitation he had the right, and it was his plain duty, not to accept it at all. He was not compelled to do so. By its acceptance he abandoned and waived the prior written agreement which called for a general warranty. This prior written agreement, it may be remarked, was executory in its character and the delivery and acceptance of the deed in question abrogated the prior agreement, and thereafter the rights and liabilities of parties are measured and determined by the contracts and covenants in the deed so delivered and accepted. *Howes v. Barker*, 3 John. 506; *Crotzer v. Russell*, 9 Serg. & Rawle 78; *Williams v. Hathaway*, 19 Pick. 387. For the same reasons, we think, that the plaintiff, under the pleadings, evidence and admissions in the cause, could not recover on the first count. The real, and controlling questions under both counts were substantially the same.

Perceiving no error in the record, the judgment of the trial court is, therefore, affirmed. All concur.

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Henderson v. The Wabash, St. Louis & Pacific Railway Company.

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HENDERSON, *Administrator*, v. THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, *Appellant*.

**Railroads:** DOUBLE DAMAGE ACT: CONSTRUCTION. Section 809, Revised Statutes 1879, subjects a railroad to the payment of double damages for hogs which escape upon its track by reason of its neglect to fence and in consequence are killed by its engines and cars.

*Appeal from Ray Circuit Court.*—HON. G. W. DUNN, Judge.

AFFIRMED.

*Wells H. Blodgett* for appellant.

The judgment should be reversed, because, 1st, The word cattle was not used in the statute in its broadest sense and cannot properly be construed as including horses, mules and swine. 2nd, The words "or other animals," as employed in the statute, do not enlarge the signification so as to make the statute include swine or any animals other than horses, cattle and mules which are therein specifically enumerated. *Grumley v. Webb*, 44 Mo. 445; *City of St. Louis v. Laughlin*, 49 Mo. 559; *State v. Crenshaw*, 22 Mo. 447; *Potter's Dwarries on Statutes*, p. 236; 2 *Parsons Cont.*, (5 Ed.) 502.

MARTIN, C.—This action was commenced before a justice of the peace, in Ray county, to recover double the value of a certain hog, owned by plaintiff, and which it was alleged got upon defendant's track and was killed, in consequence of defendant's failure to erect and maintain fences on the sides of its railroad at the point where said animal got upon said track and was killed, etc. The action was brought under what is now section 809, of the Revised Statutes. The plaintiff had judgment for double damages before the justice, from which the company appealed to the circuit court. In the circuit court the plaintiff again recovered judgment for double the value of the animal,



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and from that judgment the company appealed to this court.

The only question for determination is, as to whether the statute, section 809, subjects railroad companies to the payment of double damages for the killing of hogs which get upon their tracks and are, in consequence thereof, killed by their engines and cars. The statute in question, after defining the kind of fences and cattle-guards that shall be erected and maintained by railroad companies on the sides of their roads, provides as follows: "And, until fences, openings, gates and farm crossings, and cattle-guards, as aforesaid, shall be made and maintained, such corporations shall be liable in double the amount of damages which shall be done by its agents, engines or cars to horses, cattle, mules or other animals on said road, or by reason of any horses, cattle, mules or other animals escaping from, or coming upon said lands, etc., etc."

The position of the learned counsel for appellant may be stated in his own language: "Only when used in its broadest sense does the word 'cattle' include sheep, goats, horses, mules, asses, swine and persons; in this statute the word 'cattle' cannot be construed as including, or meaning the same thing as the words 'horses and mules,' therefore, the word cattle was not used in its broadest sense, and not being used in its broadest sense it cannot be construed as meaning or including swine." The word "cattle" is a collective name for domestic quadrupeds, including "the bovine tribe, also horses, asses, mules, sheep, goats and swine; but especially applied to bulls, oxen, cows and their young." Worcester. The argument of the appellant is, that the legislature must have intended to use the word in its special signification, otherwise it would not have employed the use of other words to include horses and mules which the word "cattle," if used alone, would have included. The result of the language employed is that sheep and swine must be excluded from the operation of the act, or the words "horses and mules" are redundant

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designations of animals sufficiently expressed in the word "cattle," or the words "other animals" must include animals of a class not mentioned in the enumeration of animals which precedes them. Either the legislature has intended to deny the remedial effects of the law to the owners of sheep and swine, or they have been guilty of a slight repetition in the words specially referring to horses and mules, or have used the word "other" in a broader sense than usually conceded to it by the rules of interpretation.

The rule that words of general signification are restricted in their application by the use of special words pointing to a special meaning, in which the words of general signification may be used, is only a rule of interpretation. It is to be followed as an aid to ascertain the true meaning of the author. It is not an absolute rule which must be followed irrespective of consequences or results. Vattel says: "In applying rules for interpreting statutes to questions on the effect of an enactment, we can never safely lose sight of its object. That must be the truest exposition of a law, which best harmonizes with its design, its objects and its general structure." Vattel, B'k 2, ch. 17, § 285. In construing a statute Lord Mansfield says: "Let us consider what are the mischiefs intended to be remedied, and the provisions of the act for remedying them." *Pray v. Edie*, 2 T. R. 313. Indeed the fundamental rule underlying all rules of interpretation of statutes requires us to give such construction of them as shall, in the most complete manner effect the known purpose and object for which they were enacted, provided the language is adequate to afford such construction without violating the obvious meaning of the words and terms employed. *Silver v. Railroad Co.*, 78 Mo. 528; *People v. Dana*, 22 Cal. 11. Effect should be given, if possible, to every clause and section of an act, so as to make the whole act consistent and harmonious. If this becomes impossible, then we are to give effect, in any event, to what was the manifest intention of the legislature, though by so doing we may restrict the meaning or applica-

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tion of general words; Sedg. Stat. & Const. Law, 201 (2nd Ed.); or treat others as surplusage. *U. S. v. Stern*, 5 Blatch. C. C. 512; *Haentze v. Howe*, 28 Wis. 293. Even though the statute be regarded as penal in form, the main object and scope of it is not changed on that account. Unquestionably, the legislature intended to furnish to the owners of farm stock, and to the passengers and employes on railroads a protection against loss and injury which did not exist at common law. Swine and sheep were as liable to loss and injury, and as liable to be the cause of accidents to railroad trains as horses and oxen. The mischief to be remedied embraced them equally with other farm stock and no reason is apparent why they should have been excluded from the provisions of the act. To carry out the well known object and purpose of the act as completely as possible, we should give a construction which will include them, unless this would do violence to the language employed. No such violence is perceptible. The intent of the act is carried out by either attributing to the word "cattle" its more comprehensive and general meaning which would include swine, or by construing the words "other animals" to include all other domestic quadrupeds liable to injury by railroad trains. The latter construction probably more nearly approximates the meaning in which the phrase was actually used by the legislature.

The rule of interpretation which would confine the phrase to the restricted meaning contended for by appellant, would lead to an unreasonable result, and require further legislation to maintain the well known purpose of the act. The fact that the construction approved by us either imputes to our law-makers the rhetorical offense of redundancy in employing the words "horses and mules," an offense by the way quite common to literary authors in our language, or attributes to the word "other" a broader meaning than usually conceded to it by the technical rules of interpretation, is a trifling objection when compared with the alternative one of greatly abridging the manifest scope

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and benefits of the act. The legislation upon this subject for nearly thirty years, goes strongly to support the construction we think proper to approve. In the revision of 1855 railroads were made liable for injuries to "animals" on uninclosed portions of their track without proof of negligence. 1 R. S. 1855, p. 649, § 5. The railroads formed under the railroad act were required to maintain fences and cattle-guards "suitable and sufficient to prevent cattle and animals" from getting on the railroad. 1 R. S. 1855, p. 437, § 52. They were made liable, until such fences and cattle-guards should be erected, in single damages for injuries to "cattle, horses or other animals." In the revision which went into force March 20th, 1866, the provisions of the railroad act relating to damages to animals were extended to all railroad corporations formed, or to be formed, in the State. Double damages were imposed, and the phraseology of the statute underwent a slight change, assuming the form in which it now appears as applying "to horses, cattle, mules or other animals." Gen. St. 1865, § 43. The provision relating to single damages in the damage act, remained the same. R. S. 1865, p. 601, § 5. "A mere change in the phraseology of a statute will not be deemed to alter the law, unless it evidently appears that such was the intention of the legislature." Sedg. Stat. and Const. Law, (2 Ed.) 197.

In this case I have to say that the change of phraseology does not indicate the change of intention contended for. The changes effected all tend to an extension of the operation of the act, and not to any abridgment of it. This is the general understanding of the legislation on this subject, which has been practically acquiesced in by the railroads for the last twenty years. After paying for injuries to swine and sheep for so long a time, I think the roads are late in raising the objection now urged in the construction of the statute.

The judgment should be affirmed, and it is so ordered.  
All concur.

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Heard v. Sack.

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HEARD, by *Guardian*, v. SACK *et al.*, Appellants.

1. **Insane Persons: ACTION AGAINST.** Process and judgment go against insane persons as against other parties, but they should defend by attorney or guardian.
2. **Judgment against Insane Person: PURCHASER AT SALE UNDER: WHEN PROTECTED.** A purchaser takes a valid title to property who, without notice of the fact of insanity, buys at an execution sale under a judgment rendered against an insane person on personal service, although without his appearance in person, or by attorney or guardian.

*Appeal from Johnson Circuit Court.*—HON. NOAH M. GIVAN,  
Judge.

REVERSED.

W. W. Wood and Sam'l P. Sparks for appellants.

The court in refusing to submit to the jury the second issue, as requested by appellants, ignored the question of appellants' notice of the insanity of respondent. In cases of simple contracts, it has always been held that where one has contracted in good faith, without notice of lunacy, equity will not rescind the contract on that ground. *Lancaster Co. Bank v. Moore*, 78 Pa. St. 407; *Mathiessen v. McMahan*, 38 N. J. L. 537; *Lincoln v. Buckmaster*, 32 Vt. 652; *Gauzer v. Skimmer*, 1 McCarter 389; *Elliott v. Luce*, 7 D. G. & M. G. 475; *Wilder v. Weakly*, 34 Ind. 181; *Bullard v. McKenna*, 4 Richd. (S. C.) Eq. 358; *McCormack v. Littler*, 85 Ill. 62; *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541; *Feeel v. Guinault*, 32 La. An. 91; *Hally v. Troester*, 72 Mo. 73; *Crawford v. Scovell*, 94 Pa. St. 48; *Rusk v. Fenton*, 14 Bush (Ky.) 413. The appellants were not parties to the suit, and there was no allegation in the petition that they had any notice at the time of their purchase at the execution sale that Heard was insane, and the petition failed, therefore, to state a cause of action. Purchasers at execution sales are protected from these secret vices in judgments, and even



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where jurisdiction does not exist, provided they are not manifest on the record. *Hardin v. Lee*, 51 Mo. 241; *Freeman v. Thompson*, 53 Mo. 183; *Kane v. McCown*, 55 Mo. 181; *Freeman on Judg.*, § 509. The judgment should not be reversed because a guardian was not appointed. *King v. Robinson*, 33 Mo. 141. Judgments obtained in good faith are not void, although plaintiff knew of defendant's insanity. *Johnson v. Pomeroy*, 31 Ohio St. 247; *Stigers v. Brent*, 50 Md. 214; s. c., 10 Cen. L. J. 473. An action can be maintained to recover a debt before he becomes a lunatic. *Hines v. Potts*, 56 Miss. 346. The contract of a lunatic is only voidable even when not for necessities. *Cruce v. Holman*, 19 Ind. 30; *Breckenridge v. Ormsby*, 1 J. J. M. (Ky.) 236; *Sowers v. Pumphrey*, 24 Ind. 231; *Cales v. Woodson*, 2 Dan. (Ky.) 452; *Allis v. Billings*, 6 Metc. 415; *Hovey v. Hobson*, 53 Me. 451; *Arnold v. Richmond Iron Works*, 1 Gray 434; *Fitzgerald v. Reed*, 17 Miss. 94; *Crowther v. Rowlandson*, 27 Cal. 376; *Maddox v. Simmons*, 31 Ga. 512; *Ingraham v. Baldwin*, 9 N. Y. (5 Seld) 42; *Elston v. Jasper*, 65 Tex. 409; *Nichol v. Thomas*, 53 Ind. 42; *Moler v. Tulip*, 40 Wis. 66. The judgment under which appellants purchased, was only voidable at most, and in such cases a purchaser who is a stranger to the record, as in the case under consideration, is protected in his purchase. *Lenox v. Clarke*, 52 Mo. 115; *Gott v. Powell*, 41 Mo. 416; *Vogler v. Montgomery*, 54 Mo. 577; *Whitman v. Taylor*, 60 Mo. 137; *Rumfelt v. O'Brien*, 57 Mo. 570; *Coleman v. McNulty*, 16 Mo. 173; *Holt Co. v. Harmon*, 59 Mo. 165; R. S. 1879, § 3691.

*John J. Cockrell* for respondent.

The deed or contract of an insane person is voidable. *Tolson v. Garner*, 15 Mo. 494; *Crouse v. Holman*, 19 Ind. 30; *Breckenridge v. Ormsby*, 1 J. J. Marsh (Ky.) 236; *Pomeroy's Eq. Juris.*, vol. 2, § 946, p. 465. But the courts of law may render judgments against them and they have no relief therefrom except in equity. *Robertson v. Lain*, 19

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Wend. 650; *Clarke v. Dunham*, 4 Denio 262; Freeman on Judg., § 152. Chancery will set aside judgments or solemn acts of record of lunatics where the utmost good faith is not shown. 5 Bacon's Abr., p. 25. F., (see note in fine print); 1 Story's Eq. Juris., §§ 228, 229, p. 251. An insane man is protected by a court of chancery and his deeds and contracts rescinded because he is incompetent to protect himself. Is he any the less competent to protect himself from loss by a sale *in invitum*? The reason of the rule applies as well to a case like this as to an ordinary contract.

PHILIPS, C.—A. J. Heard was the owner of certain real estate in Johnson county, which was sold under judgment of the circuit court of said county, for unpaid taxes. The defendants became the purchasers at said sale of said lands and received a deed therefor. In the tax suit personal service was had on said Heard, and the judgment is admitted by this suit to have been regular on the face of the record. This suit is brought by Heard, through his guardian, to set aside said deed and to restore to him his land, for the reason alleged, that at the time of the accruing of said taxes, as well as the time of service on him, and the rendition of said judgment, and the making of said sale, he was of unsound mind and incapable of transacting such business, etc. Since the sale Heard has, upon due inquest had, been adjudged insane by the probate court of said county. Tender is made in the petition, by plaintiff to defendants of the amount paid by them in said purchase, together with the interest thereon and all costs, etc.

The answer tendered the general issue, as to the allegations of the insanity at the time of the proceedings in the tax suit.

The court submitted issues to a jury touching the insanity, etc. The jury found that the said Heard was insane. Thereupon, the court found the issues for the plaintiff, and rendered judgment as prayed in the petition. From that judgment the defendants prosecute this appeal.

I. We do not deem it material to the determination of this appeal to pass upon the propriety of the issues submitted by the court to the jury, or upon the correctness of the instructions given, though I discover no valid objection to either. The proceeding being one in equity to avoid a judgment, it was optional with the court whether it would submit any issues at all to the jury. It may or may not adopt the finding of the jury. The case comes here on its merits for review.

II. On a careful reading of the evidence, we are satisfied that the court was justified in its conclusion, as to the insanity of Heard. It is a great misapprehension of the law to suppose that, in order to maintain the allegation of the petition, it was necessary to establish either the idiocy or general want of sanity on the part of Heard. The subject may exhibit perfect rationality and mental competency in many particulars, or on general subjects, yet be madly and even irrevocably insane touching some given matter. As Lord Hale says: "There is a partial insanity of mind and a total insanity. Some persons that have a competent use of reason in respect of some subjects, are yet under a particular delusion in respect of some particular discourse, subject, or application, or else it is partial in respect of degrees." Persons laboring under such delusions or insanity, touching some particular subject, often possess a degree of subtlety and acuteness on general subjects, and sometimes on the subject of their dementia, calculated to baffle the skill of the wisest in discovering their infirmity. Lord Erskine aptly expressed this idea in the celebrated Hatfield trial: "Such patients are victims to delusions, which so overpower the faculties, and usurp so firmly the place of realities, as not to be dislodged or shaken by the organs of perceptions and sense. Another class, branching out into almost infinite sub-divisions, under which, indeed, the former and every class of insanity may be classed, is, where the delusions are not of the frightful character, but infinitely various and often extremely circumscribed, yet where imagination (within the

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bounds of the malady) still holds the most uncontrollable dominion over reality and fact; and these are the cases which frequently mock the wisdom of the wisest in judicial trials because such persons often reason with a subtlety which puts in the shade the ordinary conceptions of mankind; their conclusions are just and frequently profound, but the premises from which they reason, when within the range of the malady, are uniformly false; not false from any defect of knowledge or judgment, but because a delusive image, the inseparable companion of real insanity, is thrust upon the subrogated understanding, incapable of resistance, because unconscious of attack."

While the evidence shows that Mr. Heard on general subjects, was a man of information and intelligence, comprehending the general relations of things, yet upon religious matters, and the right of the civil government to impose taxation upon its subjects, and the obligation of the citizen to submit thereto, he was *non compos mentis*. He could reason, or rather argue, about this matter from the scriptures, but his perceptive faculties were so obscured or overcast as to make him incapable of a right conclusion. So intense was his delusion, as to the kingdom of Christ, which he believed to be near establishment, and so incorrigible his mania against temporal authority, that he was wholly irrational, uncontrollable, and I think, irresponsible as to any business transaction connected with those subjects. He deemed it sinful to pay tribute, as he termed it, to the temporal powers. And evidently laboring under the delusion that Christ would ultimately restore to him his property taken for taxes, he would take no steps to protect it, nor would he permit any friend to interpose for his protection. Such a man in the particular matter of his dementia, is an imbecile, and as much the subject of protection against himself and any business transactions connected therewith as if he were a raving madman.

III. What then is the effect of a judgment rendered against such person, on personal service, without the ap-

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pearance in person, or by attorney or guardian *ad litem*? Is it void or simply voidable? Counsel has referred us to no authority maintaining that the judgment is void; and we can find none so holding. Taxes are imposed on the real estate itself. This imposition is the act of the law. It has not the qualities of a contract. It is imposed without the assent or concurrence, direct, of the mind of the land owner. So far as he is concerned, this burden on his estate exists *volens volens*. By statute, if such taxes remain unpaid for a given time, it is made the duty of a collector to proceed to enforce the payment by suit. Such suit shall be prosecuted "against the owner of the property \* \* and all notices and process in suits under this chapter shall be sued out and served in the same manner as in civil actions in circuit courts." R. S. 1879, §§ 6836, 6837. Heard, being confessedly the owner of the land, suit was properly instituted against him. He was the proper party upon whom to serve the writ, and the proper party against whom to render the judgment. Process and judgment go against the lunatic as against other parties. They should defend by attorney, or guardian *ad litem*, in the absence of a guardian proper. *Donallen v. Lennox*, 6 Dana 89, 90; *Walker v. Clay*, 21 Ala. 797; *Johnson v. Pomeroy*, 31 O. St. 248; *Stigers v. Brent*, 50 Md. 214; *Baumgartner v. Guessfeld*, 38 Mo. 36.

The court then had jurisdiction over the person of the defendant and the subject matter of the action. On what principle then can it be maintained that the judgment was void? Judgments rendered pursuant to the statute for the collection of taxes stand on the same footing as any other judgment of the circuit court, and are not assailable collaterally for mere irregularities or errors curable on appeal or writ of error. *Wellshear v. Kelly*, 69 Mo. 343. The utmost that can be alleged against the judgment is, that it is voidable. The contracts of non-sane persons, not under guardianship, are placed by most respectable authorities, on the same basis as those of infants; and, therefore, by parity



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of reasoning, should alike be voidable. *Breckenridge v. Ormsby*, 1 J. J. Mar. 288; *Lincoln v. Buckmaster*, 32 Vt. 652; *Tolson's Admr. v. Garner*, 15 Mo. 497; *Halley v. Troester*, 72 Mo. 73. The error in rendering a judgment against an insane man would not, ordinarily, appear of record, any more than in the case of a judgment against a minor. It is an error of misapprehension of a fact, existing *in pais*, not called to the attention of the court. Such judgment may be reviewed and the error rectified in the court where committed on writ of *coram nobis*. 2 Tidd's Pr. 1136; *Ex parte Toney*, 11 Mo. 662.

To such a motion, or writ of error, there does not seem to be any limitation as to the time in which it may be invoked. *Powell v. Gott*, 13 Mo. 459; *Groner v. Smith*, 49 Mo. 324. But this action is in equity, and is *res inter alios acta*, to set aside the deed made pursuant to a sale under such judgment to a stranger to the record. No doctrine of the law is better settled than that while the title of the judgment plaintiff will be forfeited by a subsequent reversal or vacation of the judgment, yet the title of a stranger who in good faith, purchased before the reversal of the judgment, will not be affected by such reversal. *Gott v. Powell*, 41 Mo. 420; *Vogler v. Montgomery*, 54 Mo. 577. Such purchasers are protected from secret vices in judgments. Where it is sought to vacate a judgment on account of matters extrinsic to the judgment, where the purchaser thereunder was not a party to the judgment, it must be averred and proved that the purchaser had notice of such infirmity; without this he is not affected thereby. *Reeve v. Kennedy*, 43 Cal. 643; *Freeman v. Thompson*, 53 Mo. 185; *Harding v. Lee*, 51 Mo. 241.

Mr. Freeman in his treatise on judgments (§ 152) says: "While an occasional difference of opinion manifests itself in regard to the propriety and possibility of binding *femmes covert* and infants by judicial proceedings, in which they were not represented by some competent authority, no such difference has been made apparent in relation to a more

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unfortunate and defenseless class of persons; but by a concurrence of judicial authority, lunatics are held to be within the jurisdiction of the courts. Judgments against them are said to be neither void nor voidable. They cannot be reversed for error on account of defendant's lunacy, the proper remedy in favor of a lunatic being to apply to chancery to restrain proceedings, and to compel plaintiff to go there for justice." The following cases support so much of the text as holds the judgment binding as between the defendant in the judgment and an innocent purchaser. *Johnson v. Pomeroy*, 31 Ohio St. 248; *Tomlinson v. Devore*, 1 Gill (Md.) 345; *Stigers v. Brent*, 50 Md. 214; *Lamprey v. Nudd*, 9 Foster (N. H.) 299; *Foster v. Jones*, 23 Georgia 168.

The cases cited in support of that portion of the text which holds that the only remedy is to ask a court of equity, while the suit for judgment is *in limine*, for a restraining order, are *Robertson v. Lain*, 19 Wend. 650; *Clarke v. Dunham*, 4 Denio 262, and *Sternbergh v. Schoolcraft*, 2 Barb. 153. These last cases, I apprehend, rest upon rulings having for their foundation a special statute of New York conferring this jurisdiction on the chancery court. See the discussion of this subject in *Stigers v. Brent*, *supra*. Redfield, C. J., with characteristic learning and a strong sense of justice, in *Lincoln v. Buckmaster*, 32 Vert. 652, applies the same rule to lunatics as to infants. He says: "When one is in the state of mental unsoundness, found in this case, he is wholly incapable of making a binding contract, as much so as an infant, or a married woman. Any other view of the case would be absurd, almost. It certainly shocks all our notions, either of justice or reason, and equally of law." He, therefore, holds that a contract of such person, as in the case of an infant, if not within the exceptional cases, may be avoided. The supreme court of New Hampshire, in *Lamprey v. Nudd*, *supra*, hold to the same doctrine. If the infant may avoid a judgment against him, when his infancy was not disclosed, reason and justice

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would apply the rule with equal force to a lunatic. If it had been averred and shown in proof that the purchasers at the execution sale had notice of Heard's mental condition, or were possessed of such facts as would or ought to put a prudent person on his guard in purchasing such property, the judgment of the circuit court might be sustained. *Matthiessen & W. R. Co. v. McMahon*, 9 Vroom (N. J.) 544. But it is neither averred in the petition, nor proved on the trial, that the defendant purchasers had any notice, whatever, of the extrinsic fact relied on for the impeachment of the judgment. It is a case of great hardship that so helpless and unfortunate a man as Heard was, should thus lose his estate. We would save him from being despoiled if the law permitted. But the law is the limit of our discretion. It is an infirmity, I think, in the revenue law that the right of such persons to redeem, within a reasonable time was not reserved; but that was a matter for the legislature. The petition in this case, if desired, may be so amended as to admit proof, if there be any, of defendant's knowledge of Heard's mental condition at the time of their purchase.

The judgment of the circuit court is reversed and the cause remanded. All concur.

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VAN BIBBER, *Administrator*, v. JULIAN, *Public Administrator*,  
*et al.*, *Appellants*.

1. **Administration:** SALE OF LAND FOR DEBTS: EQUITY. Equity will not permit heirs to hold possession of real estate together, with its increased value caused by improvements and expenditures made thereon in good faith by the administrators, and at the same time to resist the application of creditors to subject said property to the payment of their debts, on the technical ground that the improvements and expenditures constitute waste, for which the creditors should resort to a suit on the administrators' bond, with the trouble, expense and delay incident thereto.

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2. ———: FINAL SETTLEMENT: WASTE, WHEN INCLUDED THEREIN. Waste of the estate by an administrator, occurring before final settlement, is included therein, and so long as the settlement remains in force it is conclusive on the heirs and all others.

*Appeal from Greene Circuit Court.*—HON. W. F. GEIGER,  
Judge.

AFFIRMED.

*F. P. Wright and W. C. Price* for appellants.

The creditor should have given the administrators twenty days' notice of his intention to ask for an order for the sale of the real estate. The petition for the order of sale is also fatally defective in not averring positively that the personal estate was insufficient to pay the debts of the estate. When the personal estate becomes so insufficient, in consequence of the *devastavit* or neglect of duty of the administrator, an order for the sale of the real estate should not be granted in the first instance, but recourse should be had to the administrators' bond. *Merritt v. Merritt*, 62 Mo. 150.

*F. S. Heffernan* for respondent.

The final settlement of Henslee and Norfleet as administrators of Shackleford's estate, and turning over to the present administrator, their successor, the sum of \$4,367.13, the amount of money found by the court in their hands, belonging to the estate of Shackleford, deceased, and discharging them from further liability, was a final judgment and cannot be attacked in any subsequent collateral suit. Bigelow on Estop., (1 Ed.) pp. 7, 8, 22, 23, 45, 46, 159, 160, 175; *Lynch v. Swanton*, 53 Me. 100; *Bunker v. Tuffis*, 57 Me. 417; *Stewart v. Dent*, 24 Me. 111; Freeman on Judg., §§ 246, 249, 252, 253, 254, 255, 275, 319, 608, see note; *Dublin v. Chadborne*, 16 Mass. 433; *Simpson v. Norton*, 45 Me. 281; *Townsend v. Townsend*, 60 Mo. 246; *Lewis v.*

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*Williams*, 54 Mo. 200. There is no privity between an administrator and an administrator *de bonis non*. Bigelow on Estop., p. 80. A personal judgment against an administrator concludes the heirs. Bigelow on Estop., p. 80, note; *Steel v. Scineberger*, 59 Pa. St. 308. The administrators could not appeal from the final settlement after having satisfied the judgment rendered against them thereat. *Fagan v. West*, 11 Mo. 208; *Chase v. Williams*, 74 Mo. 429; *Robards v. Lamb*, 76 Mo. 192.

RAY, J.—This is an application to the probate and common pleas court of Greene county, Missouri, on the part of J. D. VanBibber, as administrator *de bonis non* of the estate of Nathan Boon, deceased, who was a creditor of the estate of G. P. Shackleford, deceased, for the sale of the real estate of said Shackleford, for the payment of debts.

The proceedings were had and conducted, under sections 10, 22, 23, 24, 25 and 26, art. 3, of the administration law, 1 Wag. Stat., pp. 94, 96 and 97. The petition was filed December 14th, 1878, by VanBibber, as a creditor, under section 23 of said statute, and charged in substance, that the estate of his intestate, Boon, was a creditor of the estate of said Shackleford, in about the sum of \$12,664.86, which had been duly allowed and classed in the 5th class of demands against said estate; that said Shackleford had died; that his personal estate was insufficient to pay his debts, and prayed for the sale of the real estate, or so much thereof (describing the same) as might be sufficient to pay the same.

Due notice of this petition was given to S. H. Julian, public administrator of said county, and administrator *de bonis non* of the estate of said Shackleford who, thereupon, filed his accounts, lists and inventories, as required by statute; of all which due notice was given to all persons interested in said estate; whereupon, T. J. Weaver and the other heirs at law of said Shackleford, appeared in court, and resisted said application, alleging, among other things,



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that the personal estate was amply sufficient to pay the debts of the deceased; and, also, claiming that if the same had become insufficient, by reason of the waste or misapplication of the administrators of said estate, that recourse should first be had to the bond of said administrator, before resort could be had to the real estate.

Upon this petition and these objections, as shown by the record, a trial was afterwards had before said court, which resulted in a finding for the plaintiff and a judgment accordingly, ordering the sale of so much real estate as might be sufficient to pay said debt, costs, etc. From this judgment the heirs appealed to the circuit court, where the judgment of the probate court was affirmed, from which the defendants have appealed to this court. This case we may remark, in one form or another, has been in this court twice before; the first time in 54 Mo. 518, the second in 66 Mo. 493.

The prior contests have been between the administrator *de bonis non* of Boon's estate, and the representatives of his administrator. This contest, however, is between Boon's said administrator and the heirs of his representative and former administrator.

From the agreed statement in the cause, we gather that Henslee and Norfleet were the original administrators of the estate of said Shackleford, deceased; that their administration commenced in 1863, and continued until sometime in 1875, when their letters were revoked by the probate court, and said estate, by order of said court, was turned over to said S. H. Julian as administrator *be bonis non*, who thereupon took and still has charge of said estate. We, also, gather from said agreed statement and said record, in substance as follows: That some time in the year last aforesaid (1875) the former administrators, Henslee and Norfleet, made with said probate court a final settlement of their said administration of said Shackleford's estate, showing that there was then remaining in their hands a balance of \$4,367.13, in cash; and, also, showing that, thereafter,

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one J. S. Moss, a surety in the administration bond of said Henslee and Norfleet, appeared in court and paid into the hands of said Julian, administrator *de bonis non* of said Shackelford's estate, the said amount of cash, so found in the hands of said Henslee and Norfleet, the former administrators as aforesaid, and, also, fully paid over to said Julian all money, property, goods, chattels and effects, remaining in the hands of said Henslee and Norfleet, and that said Henslee and Norfleet, the former administrators, had in all things done and performed the orders of said court, touching said administration, and thereupon, by order of said probate court, said Henslee and Norfleet, together with their sureties, were discharged from said trusts, etc.

The record further shows that the former administrators, Henslee and Norfleet, in the course of their administration, had paid out to the heirs of said estate, about \$1,600; and that they had expended some \$2,000 in fencing and repairs upon said real estate; that they expended about \$824.80 in purchasing in dower rights to the same, and also paid out the further sum of \$650 in purchasing outstanding titles to said real estate. Besides this, they paid out for a trip to Texas, on business of the estate, some \$658, and the sum of \$585.80 for a similar trip to Arkansas. In addition, they, also, expended considerable sums in paying the taxes due on said real estate; in attorneys' fees for professional services in and about the litigation, incident to said estate, and other expenditures and costs, incident to said administration; all of which are complained of by the heirs as constituting waste and misapplication by said administrators of the personal estate, for which they and their sureties in their official bond are responsible.

Besides this, the record further shows that when the order of the probate court for the sale of the real estate was first made, the heirs appealed to the circuit court, where said order was reversed and remanded by the circuit court, with direction to the probate court to hear all the evidence, as to any assets, in the hands of said Henslee and

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Norfleet, the former administrators, together with the disposition and application of the same, which was accordingly done, and after a full hearing and accounting, so ordered, (in which the propriety, necessity and value of said payments, expenditures and applications of said assets were considered and approved by said court,) it was again found by said court that the personal estate was largely insufficient to pay the debts, and said order for the sale of the real estate was again made, from which, also, the heirs again appealed to the circuit court, where the same was affirmed, from which the appeal was taken to this court, as before stated.

As before remarked, the contest now before us is between a creditor and the heirs of said Shackleford, deceased. It is here claimed by the latter that the personal estate is the primary fund for the payment of debts, and that the real estate can only be looked to after the personal estate has been so applied and exhausted. They, also, contend, that if the personal estate, by reason of waste or misapplication on the part of the administrator, has become insufficient, resort must first be had to the bond of the administrators and their sureties before the real estate can be looked to.

On the other hand, it is claimed for the creditor: 1st, That under the facts of this case, as disclosed by the record, the heirs are not equitably entitled to be heard to object to the alleged acts of waste and misapplication complained of in this case; 2nd, If they are, they are concluded by the final settlement of said former administrators from here contesting the matter, so long as said settlement remains in force, unappealed from and unset-aside for fraud or otherwise. The evidence in the cause, as disclosed by the record, shows that at the close of the war, it was found that all the fencing around, in and about the farm, had all been destroyed during the war, and by its ravages, and that it was impossible to rent the farm without re-fencing the same and making other necessary repairs; that said fencing and

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repairs were accordingly made; that the farm, so fenced and repaired, was rented out, and the rents collected, and accounted for, as part of the assets of said estate; that one of said heirs, T. J. Weaver, himself, made a large part of said repairs, at a cost of some \$800, and became the tenant of said farm, so repaired, and that he was allowed the costs of said fencing and repairs out of the rent, so due from him by way of set-off; that the said existing dower rights, and other outstanding titles to and upon said real estate, were purchased in for the benefit of said estate; that the taxes on the real estate, for all these years, which were a charge on said real estate, were, also, paid by said administrator on behalf of said estate. It also appeared that Shackleford, the deceased, had died away from home, in the state of Texas, having with him at the time papers, notes and evidences of debt due his estate, and that it became and was necessary to employ some one to go to Texas after them, and that Mrs. Shackleford was selected for that purpose; that she went and got them, and brought them back to the administrators at considerable expense, which was paid by said administrators. A part of the assets was also in Arkansas, and Jones was employed to go after and get them, and paid therefor. During the same period, it further appears that said Henslee and Norfleet also paid to the heirs, themselves, some \$1,800, none of which they offer to refund. It seems, also, that considerable sums were paid out, as attorneys' fees, for professional services in and about litigation, incidental and necessary to the administration of said estate. In all these transactions, said Henslee and Norfleet appear to have acted in the utmost good faith, for what they deemed the best interest of the estate and said heirs.

The propriety and good faith of all these transactions as well as others not necessary to particularize, on the part of said administrators, as well as the equitable right of the heirs to complain of them in this proceeding, were carefully considered and examined by the probate court, at the

instance of said heirs, and the finding of said court thereon was against them. It is not pretended that the fencing and repairs on the farm were not useful and valuable; nor that said dower rights, and other outstanding titles, were not valid claims; nor is it pretended that said administrators, in any of these transactions, were interested or engaged in any speculation of their own; but only endeavoring to protect, preserve and take care of the estate and trust committed to their charge. Under such circumstances, we are not prepared to say that the probate court committed error in its said findings and judgment. It may be conceded that the position contended for by the heirs, is generally true at law. It may be conceded, also, that the administrators and their sureties would be liable to a creditor for such misapplication of the personal estate, to which he has a right to look; and it may, likewise, be conceded that the heirs, also, might hold the administrators responsible for adventuring the funds of the estate in their own business, or other outside operations; or even in any unauthorized, useless or wasteful expenditures in or about the estate itself, to their prejudice. But, in a case like this, it seems to be inequitable to allow the heirs to hold the possession of the real estate, with its confessedly increased value, by reason of those improvements and expenditures, thus made in good faith, and at the same time resist this application, on the technical ground that such expenditures constitute waste, for which the creditor should be compelled to resort to a suit on the bond of the administrators, with the trouble, expense and delay incident thereto.

In the case of *Byrd et al. v. The Governor*, 2 Mo. 102, this court held, in substance, that when the deceased in his lifetime had dug and walled a cellar on a lot, and his administrators went on and built a brick house thereon, at a cost of some twelve or thirteen hundred dollars, which lot with the house thereon, was afterwards sold for the payment of debts and its proceeds applied accordingly, and a suit, thereafter, being brought on the administrators' bond



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for waste and misapplication of the funds so expended, and the court said that "it would be anything else than equitable, to allow the creditor to receive the improved value of the estate, and then to recover the full amount of the assets, which had been wasted, or misapplied towards the improvement." The case of *Merritt v. Merritt*, 62 Mo. 150, like this, was an application by creditors for the sale of real estate to pay debts, and the application was resisted by a devisee, who was interested in the real estate sought to be sold. In that case the court recognize the general rule, contended for by the heirs in this case; but proceeds to show, that, in modern practice and in proceedings like this, the rule has been to some extent modified and applied with less rigor. The court adds in this connection that "the prevailing rule now established in this court, is, that executors and administrators stand in the position of trustees to those interested in the estate upon which they administer, and are liable only for want of due care and skill, and that the measure of care and skill required of them is, that which prudent men exercise in the discretion and management of their own affairs." 44 Mo. 356; 46 Mo. 268; 49 Mo. 37; 57 Mo. 264; 59 Mo. 585.

In that case (*Merritt v. Merritt*, *supra*) the administratrix, Mrs. Merritt, had continued the business of her husband, who had leased a furnished hotel for several years, at large annual rental, to be paid in monthly installments. This, she did, without any order from the court, for a little over one year, when she sold out. She paid the rent for which the estate was liable, and by her prudent management and expenditure of the funds and assets of said estate, in the conduct of said business, the estate was benefited several thousand dollars. In the proceeding in that case, it was sought to charge her with the amount of rent, etc., so paid out by her, as for waste and misapplication of the amount so expended, and, among other things, it was held, in effect, that she was fairly entitled to a credit, for the amount

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of rents, etc., so paid in the conduct and management of said business.

If there was any question of the propriety of this view of the case, there is another objection equally fatal to the claim of the heirs in this case. The alleged waste and misapplication occurred, if at all, prior to the final settlement of said Henslee and Norfleet, and so long as that settlement remains in force, unappealed from and unset aside for fraud or otherwise, it is in a case like this, conclusive on all persons, the heirs included. Such settlements have the force and effect of general judgments, and cannot be impeached in a collateral proceeding like this. *Sheetz v. Kirtley*, 62 Mo. 417; *Lewis v. Williams*, 54 Mo. 200; *Jones v. Brinker*, 20 Mo. 87; *State to use of Tourville v. Roland*, 23 Mo. 95; 37 Mo. 300; 47 Mo. 390.

In either view, and in any event, we think the trial court did right in its finding and judgment, and the same is, therefore, affirmed.

All concur, except SHERWOOD, J., who having been of counsel, did not sit in the cause.

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GARDNER, *Appellant*, v. MATHEWS *et al.*

1. **Negotiable Note:** CONTEMPORANEOUS ORAL CONTRACT. An accommodation indorser of a negotiable note who, after demand, protest and notice pays it to the holder, cannot recover back the sum so paid by way of damages upon an oral contract, contemporaneous with the indorsement, that if on the maturity of the note the maker would execute a new one secured by a deed of trust on certain land, the note indorsed was not to be paid, but should be surrendered for cancellation.
2. **Contract, Part Parol:** EVIDENCE. When part only of an entire contract is reduced to writing, the remainder may be proved by parol, yet the latter must be consistent with and not contradictory of the written part.

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*Appeal from St. Louis Court of Appeals.*

AFFIRMED.

*W. H. Clopton* for appellant.

Plaintiff sues on the promise of defendants, made at the time he indorsed the note, that they would hold him harmless. The promise or agreement of defendants furnished no defense to the plaintiff when he was required, as indorser of the note, to pay it; but it constituted a good cause of action in a separate suit against defendants. *Atwood v. Lewis*, 6 Mo. 392; *Burcher v. Payne*, 7 Mo. 462; *Bond v. Worley*, 26 Mo. 253; *Blackburn v. Harrison*, 39 Mo. 303; *Barry v. Sansum*, 12 N. Y. 468; *Glover v. McGilcray*, 63 Ala. 508; *Hale v. Stewart*, 76 Mo. 20; *Graves v. Johnson*, 48 Conn. 160; *Harrison v. Sawtel*, 10 John. 242; *Blok v. Cale*, 22 Pick. 97; *Griffith v. Reed*, 21 Wend. 502, 505. Parol proof was admissible. The contract sued on had a consideration of its own; although it was dependent upon and was a part of the contract of indorsement. A part only of the entire contract was reduced to writing, and parol testimony is admissible to supply that portion of the contract resting in parol. *Life Ass'n v. Cravens*, 60 Mo. 388; 1 Greenleaf Ev., 284a, 281; *Beck v. Beck*, 43 Mo. 266; *Rollins v. Claybrook*, 22 Mo. 405; *Brewster v. Countryman*, 12 Wend. 446; *Richardson v. Hooper*, 13 Pick. 446; *Lopham v. Whipple*, 8 Met. 59; *Badger v. Jones*, 12 Pick. 371. The rule that written instruments cannot be controlled by parol evidence, applies only in suits between the parties to the instrument. 1 Greenleaf Ev., § 279; 1 Wharton Ev., 303, 314; *Reynolds v. Magness*, 2 Iredell 26; *Edgerly v. Emerson*, 3 Fost. 555; *Barry v. Sansum*, 12 N. Y. 468. The defendants were neither makers, payees nor indorsees of the note from Bartlett to Gardner indorsed by Gardner. *Lowell M. Co. v. Safeguard Co.*, 88 N. Y. 591.

*John G. Chandler* for respondent.

The amended petition does not state a cause of action. 1 Chitty Plead., p. 293; *Conway v. Reed*, 66 Mo. 346; *Garner v. McCullough*, 48 Mo. 318; *Syme v. Steamboat*, 28 Mo. 335. Parol proof was incompetent to prove the agreement set up in the amended petition. Negotiable notes are written instruments, and as such they cannot be contradicted, nor can their terms be varied by parol evidence; and that proposition is universally true where the promissory note is in the hands of an innocent holder. *Brown v. Spofford*, 95 U. S. 474, 480; *Brown v. Wiley*, 20 How. 442; *Shankland v. Washington*, 5 Pet. 394; 1 Greenleaf Ev., (12 Ed.) 318; *Stackpole v. Arnold*, 11 Mass. 27; *Hunt v. Adams*, 7 Mass. 518; *Myrick v. Dame*, 9 Cush. (Mass.) 248; *Thompson v. Ketchum*, 8 Johns. 192; *Bank v. Dunn*, 6 Pet. 51; *Specht v. Howard*, 16 Wall. 564; *Forsyth v. Kimball*, 91 U. S. 291; Chitty Cont., (10 Ed.) 99; *Abrey v. Cruz*, Law Rep. 5 C. P. 41; *Allan v. Furbish*, 4 Gray 514; 2 Parsons Notes and B., 501; *Rodney v. Wilson*, 67 Mo. 123. In the absence of fraud, accident or mistake, the rule in equity is the same as at law. *Brown v. Spofford*, 95 U. S. 474, 481; *Forsyth v. Kimball*, 91 U. S. 291; 2 Story Eq., § 1531; *Rodney v. Wilson*, 67 Mo. 123; *Foster v. Jolly*, 1 Cr. M. & R. 703. Parol evidence is inadmissible to prove a stipulation or condition which is not mentioned in the written instrument. *Beard v. White*, 11 Allen 436; *Warren Academy v. Stern*, 15 Me. 443; *Bank v. Dunn*, 6 Pet. 51; *Fairfield Co. v. Thorp*, 13 Conn. 173; *Isaacs v. Elkins*, 11 Vt. 679; *Rawson v. Walker*, 1 Stark. 361; 2 E. C. L. 427; *Lane v. Price*, 5 Mo. 101; *Richards v. Thomas*, 1 Cr. M. & R. 772; *Spring v. Lorette*, 11 Pick. 417; *Burger v. Deshiman*, 11 Blackf. 272. Parol evidence of agreement to renew a note at maturity is not admissible. Edwards on B. and N., 147, 148, 313, 315. Indorsement cannot be varied by parol. 1 Greenleaf Ev., 277; 2 Parsons N. and B., 23, *et seq.*

NORTON, J.—This cause is before us on appeal from the judgment of the St. Louis court of appeals, reversing the judgment of the circuit court of the city of St. Louis, and the appeal involves the question whether an accommodation indorser of a negotiable note, who after demand, protest and notice pays the note to the holder, can maintain an action to recover back by way of damages the amount so paid, basing his right to recover upon an alleged oral contract made at the time of the indorsement, that if, on the maturity of the note, the maker would give a new note secured by deed of trust on certain real estate, the note so endorsed was not to be paid by the indorser, but was to be surrendered to him for cancellation. The court of appeals, we think, properly answered the question in the negative, and its ruling in that respect is sustained by the authorities cited in the opinion reported in 11 Mo. App. 269. By indorsing the note the indorser contracted to pay the note at maturity, if the maker did not, conditioned only upon the fact that a demand be first made upon the maker, and notice given to the indorser of its dishonor, and we think it clear, that in a suit by the holder against the indorser, after such demand, protest and notice, that he would not be permitted to introduce parol evidence to vary his contract, surely not to the extent of establishing an oral agreement made contemporaneous with, or anterior to the indorsement that he, in fact, was not to pay according to the contract which the law, from the indorsement alone, implies. *Rodney v. Wilson*, 67 Mo. 123; *Jones v. Shaw*, 67 Mo. 667, 670.

Indeed the principle above stated, seems to be conceded by the learned counsel for plaintiff, but he contends that, notwithstanding it, plaintiff can maintain his action for damages on such contemporaneous oral agreement, and recover back as damages what he had voluntarily paid, and cites in support of his position, that in such action evidence of such oral agreement should be received, a class of cases of which the case of the *Life Association of America*



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*v. Cravens*, 60 Mo. 388, is a type, holding that when a part only of an entire contract is reduced to writing that parol testimony is receivable to supply that portion resting in parol. While that case announces this principle, in the case of *Jones v. Shaw*, 67 Mo. 667, 670, it is said after referring to the case of *Life Association of America v. Cravens*, *supra*, "that it is conceded when part only of an entire contract is reduced to writing the remainder may be proven by parol. But in all such cases, the parol contract must be consistent with, and not contradictory of the written one."

Judgment affirmed, in which all concur.

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HAMPTON V. HELMS, *Appellant*.

**Deed:** DESCRIPTION: EXCEPTION. A grantor in a deed conveyed the "west half of section 15, being 320 acres," and in a subsequent clause of the same deed conveyed another tract in section 22, except ten acres, describing the land so excepted by metes and bounds, which exception, according to said metes and bounds, extended into and included a part of the west half of section 15, previously conveyed; *Held*, (1) That whether the deed passed to the grantee the entire west half of section 15 was a question of intention on the part of the grantor to be ascertained from the deed itself, and (2) That all said west half of section 15 passed to the grantee, the exception not reserving to the grantor any part of said section 15 previously conveyed.

*Appeal from Ralls Circuit Court.*—HON. THEODORE BRACE,  
Judge.

AFFIRMED.

*Reuben F. Roy* for appellant.

The trial court erred in refusing the instruction asked by the defendant. To hold that the excepted tract of ten

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acres is limited on the north by the north line of section 22, is to destroy the metes and bounds, and to cut the subject matter in halves, by a line not in the minds of the parties, and the location of which may have been unknown.

(1) "If land in a deed is described by metes and bounds, or by other visible objects, they, being specific and exact, will restrain and control all words of general description." Bishop on Cont., p. 214, § 594; *Railroad Co. v. Green*, 68 Mo. 177; *Fenwick v. Gill*, 38 Mo. 525; *Evans v. Green*, 21 Mo. 207; *Bradshaw v. Bradbury*, 64 Mo. 334; *Bates v. Bower*, 17 Mo. 550. (2) The fact that the descriptive words mention first the west half of section 15 being 320 acres, and then names the other tracts before describing the excepted tract, should have no weight. The deed in fact conveys only one body of land excepting out of it as first described, a part thereof. 3 Washburn on Real Prop., (3 Ed.) chap. 5, § 4, p. 369, side p. 639; *Bogy v. Shoab*, 13 Mo. 377. (3) The principle that if the instrument defines the land with convenient certainty, any false description may be rejected, is too familiar to need the citation of authorities. (4) The exception in the deed to Hampton left him without title to the land in controversy.

*Thomas H. Bacon* for respondent.

James Hornbeck's deed to respondent conveys to respondent the west half of section 15, in township 56, range 6, in Ralls county, Missouri. This is a description by metes and bounds. *Hartt v. Rector*, 13 Mo. 497, p. 506, top. James Hornbeck's deed to respondent conveys to respondent 320 acres as the west half of section 15, township 56, range 6, in Ralls county, Missouri. The laws of the United States call for 320 acres as a full half section. U. S. Stat. 1796, R. S. 1874, p. 441, § 2395. The absence of a "more or less" qualification doubly expresses the intent to convey a full half section. James Hornbeck's deed to respondent of the west half of section 15, does not except or reserve

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therefrom anything whatever. The alleged exception occurs in a subsequent part of the deed, referring to another piece of land, a clause as much detached as if two separate deeds had been made. In case of conflict the first clause must govern. 1 Black. Com., chap. 23, § 6, p. 381. A saving clause repugnant to the body of a deed is void. The reservation in Hornbeck's deed must be construed most strongly against the grantor. *Shine v. Central, etc.*, 70 Mo. 524. Acreage called for in section 22 cannot be carved out of section 15. The excess of acreage must be rejected as inconsistent. *Ware v. Johnson*, 66 Mo. 662; *Campbell v. Johnson*, 44 Mo. 248. John A. Hampton's deed was prior in time, was dated December 25th, 1862, and thereafter the grantor never claimed any part of the west half of section 15.

HENRY, J.—This is an action of ejectment for a parcel of land lying in Ralls county. Both parties claim under James Hornbeck, who by his deed dated December 15th, 1862, recorded December 27th, 1862 conveyed to plaintiff the following land: Forty-seven and one-half acres, the south end of the west half of the southwest quarter of section 10; also the southeast quarter of section 9, except twenty acres off east side of north half of the east half of said quarter, being 140 acres; also the west half of section 15, being 320 acres; also the east half of the southeast quarter of section 16, being eighty acres; also the south half of the west half of the same quarter, being forty acres; also that part of the northeast quarter of section 21, lying north of Hannibal, Ralls County & Paris Plank Road, supposed to be 140 acres; also all north of said road, lying in the northwest quarter of section 22, except ten acres off the east side, to commence at the plank road at the east side, running west one hundred yards along said road, thence north a distance sufficient to make ten acres, thence east one hundred yards, thence south to the place of beginning, the balance supposed to be seventy acres more

or less. Also, the north quarter of the southeast quarter of section 15, being forty acres; also the north quarter of the west half of the southwest quarter of section 14; all in township 56 north, in range 6 west, in all 897½ acres.

It appears that the ten acres excepted, ascertaining it by the metes and bounds, lies partly in section 22, and partly in section 15, and after the death of Jas. Hornbeck, was sold by his administrator and conveyed to defendant as "ten acres off the east side of that part of the northeast quarter of section 22, township 56, range 6, west, to commence," etc., following the description of the ten acre tract in the deed from Hornbeck to plaintiff. Plaintiff immediately after his purchase took possession of the west half of section 15 (320 acres), including that portion of the ten acre tract in dispute. Hornbeck never after his deed to plaintiff laid claim to any part of the west half of section 15. It was all enclosed and continued in plaintiff's possession until defendant entered upon it. The whole controversy turns upon the construction of Hornbeck's deed to plaintiff. He conveyed to plaintiff the west half of section 15, 320 acres having in the same deed embraced other tracts, some described before and some after the tract in question, after which the exception in the conveyance is made of "all north of said road (Hannibal, Ralls County & Paris Plank Road) lying in the northwest quarter of section 22, except ten acres off of the east side, etc., the balance supposed to be seventy acres." Evidently the grantor supposed he had eighty acres in the northwest quarter of section 22, north of the plank road, and that 70 acres remained in the quarter after deducting the excepted ten acres. We gather this from the face of the deed, and the question is, shall it be construed to diminish the quantity expressly granted in the west half of section 15. We think not, and it strengthens our view that Hornbeck himself never claimed to own any part of the west half of section 15 after his deed to plaintiff, but on the contrary, pointed out the section line as his division line. The conveyance of

the west half of section 15 is a description of the land by metes and bounds. This was so held in *Hartt v. Rector*, 13 Mo. 506, and the court observed: "A principle meridian line is laid down, then townships and ranges, so that a person of ordinary capacity can designate the tracts and point out the lands and the various sub-divisions; and he knows just as well what specific tract or parcel of land is pointed out by the description of the southeast fractional quarter of section 35, township 49, range 17 west, south of the Missouri river, as if the external lines and corners thereof had been run and marked and platted down by the surveyor."

The proposition that a description by metes and bounds will control words of general description is not questioned, but here is a conveyance by metes and bounds of the west half of section 15, and an exception in a conveyance of another tract of ten acres described by metes and bounds which included a portion of the other tract, described by metes and bounds, and the question is one of the intention of the grantor to be ascertained from the deed itself. The exception is repugnant to the prior grant of the entire west half of section 15, and to the number of acres, 320, specified as the quantity conveyed. The excepted ten acres are expressly stated to be in section 22, and to be part of a tract north of the road supposed to contain eighty acres. The grantor was not certain as to the amount, and there is nothing on the face of the deed to warrant the inference that he intended to except from the conveyance of the west half of section 15 any part of the 320 acres it contained. Such was the construction placed upon the deed by the court below, and it did not err in refusing the following declaration of law asked by defendant: The court, sitting as a jury, declares the law to be that although the piece of land excepted from the conveyance in the deed from Hornbeck to Hampton, is stated in said deed to be in section twenty-two; yet, if said tract, as further described in said deed as follows, to commence at the plank road at the east side, running west one hundred yards along said road, thence



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north a distance sufficient to make ten acres, thence east one hundred yards, thence south to the beginning, cannot be located in section twenty-two, so as to cover the amount of ten acres, but that said ten acres would extend far enough north into section fifteen to include the land in controversy, then the verdict should be for the defendant.

All concurring, the judgment in favor of plaintiff is affirmed.

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BORDERS V. BARBER, *Administrator, Appellant.*

1. **Depositions: COMMISSIONS, HOW ADDRESSED.** Commissions to take depositions need not, under our statutes, be addressed to any particular officer or place.
2. —: **OFFICIAL CHARACTER AND VENUE OF OFFICER.** Where the official character of the officer certifying to depositions and the venue of his office appear with reasonable certainty from his certificate and the caption read together, it is sufficient in that regard.
3. —: **CAPTION: NOTICE: VARIANCE.** Where the caption to the deposition of a witness showed that it was taken between the hours of 9 a. m. and 4 p. m., and the notice designated between the hours of 8 a. m. and 6 p. m. of the same day: *Held*, the variance was immaterial, in the absence of any pretense that the deposition was taken at an unseasonable hour within the time prescribed, or that the opposite party was hindered in making a cross-examination, had he desired to do so.
4. —: **RETURN OF: CLERICAL ERRORS: JUDICIAL DISCRETION.** The trial court may, in its judicial discretion, order a deposition to be returned to the officer before whom it was taken, for the correction of clerical or formal errors made by him.
5. —: **WHEN NOT ADMISSIBLE IN ANOTHER SUIT.** Where the parties and issues in two suits are not the same, depositions taken in one cannot be read in evidence on the trial of the other.
6. **Interest: RATE AFTER MATURITY.** Where a note stipulates simply for the payment of interest at ten per cent from date, it will, also, bear the same rate after maturity.

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*Appeal from Bollinger Circuit Court.*—HON. J. H. NICHOLSON,  
Judge.

AFFIRMED.

*Cahoon & Whybark* for appellant.

The refusal of the court below to sustain defendant's motions to suppress the depositions of Samuel Frazier, and their admission for plaintiff are manifest errors for which alone the cause should be reversed. *McLean v. Thorp*, 4 Mo. 257; R. S. 1879, §§ 2152, 2153; *Ober v. Pratte*, 1 Mo. 80; *Leak v. Elliot*, 4 Mo. 446; *Riggin v. Collier*, 6 Mo. 568; *Hite v. Lenhart*, 7 Mo. 22; *Cox v. St. Louis*, 15 Mo. 431; *Mooney v. Kennett*, 19 Mo. 551; *Charlotte v. Chouteau*, 25 Mo. 465. The court should have permitted defendant to prove by Ezekiel Barber that the note and mortgage were given by James Barber to Ritchey to cover money and property which he was from time to time to furnish Barber, and anything he received from Barber was to be credited on the note, and that Barber did not get all the money at once. R. S. 1879, § 3565; *Waldheir v. Railroad Co.*, 71 Mo. 514; *Price v. Railroad Co.*, 72 Mo. 414; *Ferris v. Thaw*, 72 Mo. 446; *Chambers v. Meyer*, 68 Mo. 626; *Wells v. Sharp*, 57 Mo. 56. The court should have permitted defendant to show the bad character of Samuel Frazier, whose deposition had been read. The impeaching witnesses Yount, Kimminger and Biffle were competent under the facts of the case. 1 Wharton on Ev., § 563. The deposition of Luke White, taken in the case of *Necce et al. v. Borders et al.* should have been admitted, the issues in that suit and the one on trial as to fraud being the same, and the plaintiff having had an opportunity to cross-examine the witness when his deposition was taken. *Jaccard v. Anderson*, 37 Mo. 91; *Adams v. Raigner*, 69 Mo. 363; *Breedon v. Fenert*, 70 Mo. 624. Plaintiff's tenth instruction was wrong; it directed a verdict on the plaintiff's showing only, and was

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not cured by those given for defendant. *Goetz v. Railroad Co.*, 50 Mo. 473; *Thomas v. Babb*, 45 Mo. 384; *Modisett v. McPike*, 74 Mo. 636. The instruction was wrong also in requiring the interest to be computed at ten per cent from its date until the date of the trial, a period of nearly five years after the note became due. After maturity the note drew interest at six per cent. *Brewster v. Wakefield*, 22 How. 118; *Holden v. Trust Co.*, 100 U. S. 72; *Burnhisel v. Firman*, 22 Wall. 170; 3 Parsons on Cont., pp. 104, 105.

*Johnson & Nalle* for respondents.

The court committed no error in the matter of the depositions of Samuel Frazier. The assignment of a note carries with it all of the securities, equities, etc., and so the assigning of the mortgage and debt evidenced, thereby carries with it the note, and as the assignments are in writing, it makes no difference that they are upon the mortgage, the note or a separate paper. *Laburge v. Chorin*, 2 Mo. 179; *Anderson v. Baumgather*, 27 Mo. 80; *Mitchell v. Ladew*, 36 Mo. 527; *Chapell v. Allen*, 38 Mo. 213; *Potter v. Stevens*, 40 Mo. 219; *Kansas City S. A. v. Martin*, 61 Mo. 435; *Logan v. Smith*, 62 Mo. 455; *Picket v. Jones*, 63 Mo. 195. The court below was correct in excluding evidence offered by appellant to show that the note and mortgage were given to secure future advances, there was no such issue. R. S. 1879, § 3527; *Pier v. Hennaheffental*, 52 Mo. 333; *Weil v. Poston*, 77 Mo. 284, and authorities there cited. The ruling of the circuit court, in excluding depositions taken in another action when the parties and issues were all different, is correct. The rule given by the court as to the computation of interest on the note, was the correct one.

PHILIPS, C.—This is an action to recover judgment on a note executed by James Barber to William Ritchey, and to foreclose a mortgage given by said Ritchey to secure the payment of said note. The petition alleged the assignment

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of said note by Ritchey to plaintiff for value, in the usual course of trade before its maturity. The note was non-negotiable. James Barber having died, the suit was revived against the defendant as his administrator.

The answer admitted the execution of the note and mortgage; but put in issue the assignment of the note and mortgage to plaintiff and denied that any part of the note was unpaid. It further pleaded that the said James Barber had sold and delivered to said Ritchey certain goods, and performed certain work for him, in payment of said note, the aggregate amount whereof was more than sufficient to satisfy the note; that this occurred while said James held the note and the same should have been credited thereon. It was further alleged that the plaintiff took said note with notice, etc.; and the note was transferred to him under a collusive arrangement between the said Ritchey and plaintiff to defraud Ritchey's creditors. The reply put in issue the new matter set out in the answer; and, also, alleged a general settlement between said Ritchey and James Barber, touching all dealings between them, covering the matters pleaded in the answer, and that on said settlement James Barber owed a balance to Ritchey which he then promised pay. On a trial had before a jury and preliminary thereto, many questions arose which will be noticed in their proper order in the opinion. The plaintiff recovered for the full amount of the note upon which the court proceeded to render judgment and to foreclose the mortgage. From that judgment the defendant prosecutes this appeal.

I. The first error assigned for a reversal of the judgment is, the refusal of the court to suppress certain depositions taken on behalf of plaintiff. These depositions were taken at Sparta in Randolph county, Illinois, at different dates and under commissions issued out of the clerk's office of the Bollinger circuit court. Objection was made to the commissions because they were directed to no particular officer or place. The commissions are addressed "to

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any judge, notary public, justice of the peace or other judicial officer of the state of Illinois, or to any — greeting.” We think the commission was well directed under the last clause of section 2133, Revised Statutes, 1879. It authorized the notary public to take a deposition provided he was a notary public of the state of Illinois. Section 2152 of said statute makes the certificate of such notary “in his official character accompanied by his seal of office \* \* \* sufficient evidence of the authentication of such deposition.” Objection is made to the certificate because it showed the notary was merely a notary “of Sparta” or “in Sparta.” The criticism is, that it does not appear what Sparta is, whether it is a town or city. This is hypercritical. The whole paper, the caption and certificate, should be read in connection, and if from the whole the official character of the certifying officer, as also the venue, can be ascertained to a reasonable certainty this will suffice. Weeks’ L. Dep., § 351. The caption states that the witnesses came before “me, R. J. Goddard, as notary public in Sparta, in and for said Randolph county, state of Illinois.” The certificate recites, “I, Reuben J. Goddard, as notary public of Sparta, in and for Randolph county, state of Illinois, and *ex-officio* commissioner to take depositions under and by virtue of the annexed commission do hereby certify,” etc. And it is so signed. It is manifest that the words “of Sparta” indicate merely the residence of the notary while the words: “In and for the county of Randolph” as clearly point the venue where his official acts are authorized.

In respect to the deposition of the witness, Frazier, as it was originally filed in the clerk’s office, the caption showed that it was taken between the hours of “9 a. m., and 4 p. m.,” whereas the notice designated between “8 a. m., and 6 p. m.” This variance was not material. In the case of *Kean v. Newell*, 1 Mo. 754, the notice was to take the deposition between 10 and 6, whereas the certificate showed that it was taken between 8 and 6. This was bad for the



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reason that the deposition may have been taken within hours outside of those prescribed in the notice. The certificate to Frazier's deposition shows it to have been taken within the hours designated. There being no pretense that the deposition was taken at an unseasonable hour within the time prescribed, or that defendant was hindered in making a cross-examination, had he desired to so do, the deposition should not have been suppressed for the discrepancy. *Waddingham v. Gamble*, 4 Mo. 465; *Moss v. Booth*, 34 Mo. 316; *Scharfenburg v. Bishop*, 35 Ia. 60. It appears also that the word "touching" was omitted from the notary's certificate where it should have occurred in the following clause: "Who was sworn to testify the whole truth of his knowledge touching the matter in controversy." This was a mere clerical omission, and the absence of the word did not impair the certificate. The statute requires that the certificate shall show that the witness subscribed and swore to his examination. R. S., § 2151. The certificate in question clearly enough showed that the witness was sworn, and that he subscribed to the examination. That was sufficient.

The next objection to the certificate is, that the official seal of the notary was not affixed. This was material. The record shows that on motion to suppress, made by defendant, the court found the above enumerated omissions in the certificate, and thereupon directed the clerk of the court to return the depositions to the notary for correction, as the facts might be. This was done. The notary corrected the hours, as stated in the original certificate, so as to conform to those named in the notice, and inserted the word "touching," where it was omitted, and after affixing his seal of office, certified to the changes made, and returned the deposition to the clerk. At the next term of court the defendant filed a motion to suppress the deposition, based upon the omissions in the original certificate, and alleging the irregularity of the action of the court in permitting the deposition to be withdrawn from the files as aforesaid. This

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motion the court overruled. Was this action of the court in having the clerk so return the deposition for correction such irregularity as to justify or require the suppression of the deposition? It is true there is nothing in the statute either providing for such action or prohibiting it. In the administration of justice by the courts of general jurisdiction, there is necessarily much in the course of procedure left to a wise discretion of the trial judge. That of course must be a judicial discretion, and exercised always in the furtherance of justice. The officer taking this deposition was acting under and by virtue of a commission issued from the court. He was, therefore, *pro hac vice*, an officer of the court. Where the omission, as in this case, is merely one of form in neglecting to affix the seal, I can see no valid objection to the course taken by the judge in this instance. In the chancery practice when the mode of taking the deposition under commission was not pursued, the rule was to return the commission for rectification. *Gates v. Beecher*, 3 T. & C. (N. Y.) 404. In *Calmes v. Stone*, 7 La. An. 133, objection was made to the deposition on the ground that the commission was not properly authenticated by the governor of Mississippi, where the deposition was taken. The plaintiff obtained leave of the court, and withdrew the papers and sent them to the governor, who authenticated them properly. The court refused to suppress on account of the alleged irregularity. In *Leatherberry v. Rudcliffe*, 5 Cranch C. C. 550, the party taking the depositions withdrew them from the files in order to have the magistrate who certified them amend his certificate. The defendant's counsel did not except to this action at the time, (nor did the defendant in this case). The court declined to suppress it. It has been repeatedly held, under statutes directing a particular mode of sealing and transmitting to the clerk depositions, that, although this law has not been strictly conformed to, the deposition ought not to be suppressed.

The governing principle in such cases seems to be this: If the court is satisfied that the substance of the deposi-

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tion is intact, that the paper has not been tampered with in any particular, to the detriment of the adverse party, it should be admitted. *Weeks' L. Dep.*, 418; *Van Sickle v. Gibson*, 40 Mich. 170; *Nelson v. Woodruff*, 1 Black 156; *Goff v. Goff*, 1 Pick. 475. In *Dailey v. Green*, 15 Pa. St. 118, the deposition, in violation of an express rule of court, was taken out of the prothonotary's office and carried out of the county. The court refused to suppress it. In answer to the suggestion of counsel that this practice ought not to be countenanced on account of its liability to abuse, and the officer taking the deposition being beyond the jurisdiction of the court, so that he could not be dealt with for falsifying his certificate, it may be said the same objections would lie against the first taking. The safeguard the opposite party has in the first instance, is the notice the law requires he should receive, the right and the opportunity to be present and to watch the officer, and the right to bring before the court where the deposition is offered, any question touching its irregularity or integrity. So here, the action taken by the court in ordering the deposition returned was in open court, when the defendant was present. He had notice and opportunity to detect any improper action of the notary. But all the notary did in this case that was material was to affix his seal. All he did was formal, in no manner affecting the evidence, or any valuable right of the defendant. Under such circumstances, we do not think the discretion of the court was unsoundly exercised. This is a practice not to be too frequently indulged, and the trial courts cannot be too cautious and circumspect in guarding it. The objections made to the other depositions are of little merit, and are covered by the principles applied to the Frazier deposition.

II. On the trial the defendant offered in evidence the deposition of one Luke White, taken in the cause of one *Joseph C. Neece v. James J. Borders*, (the plaintiff here) and *St. Louis Life Ins. Co. et al.*, defendants, theretofore pending in the Bollinger circuit court. Notice of intention to offer

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said deposition in this cause was timely given by defendant. The court, on objection of plaintiff, refused to admit this deposition. This action of the court is assigned for error. While it cannot be maintained, in admitting depositions taken to be used in another trial, that complete mutuality is required, as in the case of judgments, yet the general rule so far applies that the issues in both cases must be the same. I know of no authority, entitled to recognition for the admission of a deposition taken in a suit between A. and B., against B. in a subsequent suit of B. against C., where B. is claiming no right or succession under the suit between him and A., and where C. is in no wise in privity with either party to the action of B. against A. *Parsons v. Parsons*, 45 Mo. 266; *Adams v. Raigner*, 69 Mo. 363; *Weeks' Law Dep.*, § 471. It is true that the deposition of White bore upon a question at issue in this action, but the issues in the two suits were not by any means the same, and the parties are not the same. The deposition was properly excluded.

III. Complaint is made of the following instructions given on behalf of plaintiff:

"The court instructs the jury, that if they find from the evidence that the plaintiff is entitled to recover upon the note in controversy in manner and form as he has charged in his petition, then the jury should assess his damages in the amount due on the note in controversy, with interest thereon at the rate of ten per cent. per annum from date, to-wit: From September 25th, 1870, up to date."

The following is a copy of the note: "On or before the 1st day of October, 1875, I promise to pay to Wm. Ritchey the sum of \$500, for value received, bearing interest at ten per cent from date. This 25th day of September, 1870.

JAMES BARBER."

It is apparent from the amount found by the jury that they computed interest on the note at the rate of ten per cent per annum from its date to the day of the verdict.

Appellant contends that, inasmuch as the note does not expressly stipulate for any rate of interest after maturity, as by the employment of some such term "until paid," only the statutory rate of six per cent is recoverable after maturity. This position it must be admitted is supported by authorities of great weight. *Brewster v. Wakefield*, 22 How. (U. S.) 118; *Burnhisel v. Firman*, 22 Wall. 170; *Hollden v. Trust Co.*, 100 U. S. 72; *Eaton v. Boissonnault*, 67 Me. 540; *Ludwick v. Huntzinger*, 5 Watts & Serg. 51; *Pierce v. Swanpoint Cemetery*, 10 R. I. 227; *Macomber v. Dunham*, 8 Wend. 550; *Clay v. Drake*, Minor (Ala.) 164; *Kitchen v. Branch Bank Mobile*, 14 Ala. 233 and, perhaps, other cases. The leading opinion among these is, that of *Brewster v. Wakefield*, 22 How., delivered by Taney, C. J. The argument is that under the statute fixing a conventional and uniform rate of interest, a special contract in writing is necessary to entitle the payee to a higher rate than the uniform statutory rate. The debtor agrees to pay the higher or conventional rate from date to a fixed time, *i. e.*, until maturity. His contract does not extend beyond this fixed period. Therefore, the creditor, although entitled by the special contract to the higher rate up to maturity of the principal debt, has no contract for interest beyond that time. For interest beyond that time he can look only to the law which gives him six per cent, the uniform rate.

We should feel great diffidence, if not embarrassment, in opposing our opinion to so eminent a jurist, as well as to others who have followed him, if unsupported by the most cogent reasons and high authorities. The following cases support with emphatic announcement the opposite view: *Brannon v. Pursell*, 112 Mass. 63, 71; *Beckwith v. Trustees*, 29 Conn. 269; 33 Conn. 431; *Overton v. Bolton*, 9 Heisk. (Tenn.) 762; *Pridgen v. Andrews*, 7 Tex. 461; *Hopkins v. Crittenden*, 10 Tex. 189; *Cox v. Smith*, 1 Nev. 171; *Spencer v. Maxfield*, 16 Wis. 178; *Pruyn v. Milwaukee*, 18 Wis. 367; *Etnyre v. McDaniel*, 28 Ill. 201; *Kilgore v. Powers*, 5 Blackf. 22; *Thompson v. Pickel*, 20 Ia. 400; *Kohler v. Smith*, 2 Cal.



597. These cases, I think, stand on a rock. Interest is a compensation for the use of money, for its detention. Under the statute, if the contract be silent, six per cent is given arbitrarily. When the parties do not rely on the statute, but make their own contract for the use of the money loaned, and stipulate that the lender from the day he takes it, shall pay ten per cent interest, the common sense of this contract is, that so long as the borrower has the use he will pay the stipulated rate of interest. By fixing a time of payment for principal and interest the borrower is protected against any earlier demand from the lender. If he does not see fit to hunt up the payee or apply at the place of payment, if any be designated, and offer to pay at maturity, it should be treated by the lender as an election on the part of the debtor to continue the contract. He should not upon the clearest principles of equity be permitted to turn his default and his creditors' indulgence to his own advantage.

Such, I am satisfied, is the common understanding and usage in commercial circles in this State. Such too was the view expressed by a majority of this court in *Payne v. Clark*, 23 Mo. 259. I am further persuaded of the correctness of this construction from another provision of our statute. By section 2725, Revised Statutes 1879, it is provided that all judgments and orders for money upon contracts bearing more than six per cent interest, shall bear the same rate of interest borne by such contracts. This note is a contract. The statute says the judgment shall bear the same rate of interest called for in the note. It is a method of ascertaining the damage for the detention of the money after judgment. It would be singular to have, between the maturity of the note and the rendition of the judgment, a rate of interest different from that expressed in the contract, the note, and after judgment the rate designated in the note.

IV. Appellant has suggested other errors. We have given them deserved consideration. They are without im-

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portance. The defendant contested the action on every conceivable point of attack, but was beaten on the merits.

The judgment of the circuit court must, therefore, be affirmed. All concur.

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McIRVINE, *Plaintiff in Error*, v. THOMPSON *et al.*

**Motion for New Trial: EXCEPTIONS: PRACTICE IN SUPREME COURT.**

Where a party fails to except to the action of the court in overruling his motion for new trial, he will be held to have acquiesced therein, and the Supreme Court will not consider matters called to the attention of the trial court by such motion, but will affirm the judgment if it be supported by the pleadings.

*Error to DeKalb Circuit Court.*—HON. J. P. GRUBB, Judge.

AFFIRMED.

*Henry E. Glazier and Ramey & Brown* for plaintiff in error.

*Samuel G. Loring* for defendant in error.

MARTIN, C.—This was an action of ejectment in the usual form for a parcel of land in DeKalb county. Both parties claimed under a common source of title. The deed under which plaintiff claimed from the common grantor, had been recorded in Gentry county and not in DeKalb county, in which the land was situated. The deed, under which defendant claimed, was subsequent in time, but was duly recorded. The issue presented to the jury involved the question as to whether the claimants under the second deed received their title, for consideration, and without notice of the former conveyance so as to be innocent purchasers in good faith. The jury upon the evidence and instructions found a verdict for the defendants.

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The plaintiff excepted to the action of the court in refusing an instruction asked by him. He also excepted to the action of the court in giving the instructions asked by defendants. He very properly called the attention of the court to those matters in his motion for a new trial. But he failed to except to the action of the court in overruling said motion, and refusing a new trial. He occupies the attitude of acquiescing in its action, and for this reason we cannot consider any supposed errors in that respect. *Wilson v. Harby*, 76 Mo. 345.

The judgment for defendants, being supported by the pleadings, will have to be affirmed, and it is so ordered. All concur.

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HUCKSHORN, *Appellant*, v. HARTWIG.

1. **Ejectment:** TITLE: LIMITATION. One who shows no color or claim of title to land, in order to acquire title thereto by adverse possession and limitation, must show by a preponderance of testimony and to the satisfaction of the court or jury, that he and those under whom he claims, have had the actual, continuous, uninterrupted and adverse possession of the same for not less than ten years before commencement of suit for recovery of its possession.
2. ———: ———: ———. Where one, and those under whom he claims, entered upon and occupied land by mistake as to the true boundary line between such land and an adjoining tract, but only intending to claim to the line, as it might be subsequently ascertained, then such possession is not adverse to the true owner, and a title by limitation cannot be acquired thereby.
3. ———: ———: ———. Where defendant, within ten years before the commencement of suit, and before he had had ten years' possession of land, stated to plaintiff that he only claimed to the true line between their lands, and would be governed by the survey whenever a correct line was made, then his possession of the tract in dispute from that date would not be adverse to plaintiff, if on a correct survey it should be found to be part of the tract described by its numbers in plaintiff's petition, although defendant may have stated at the time that he claimed the line to which he then held to be the true one.

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4. **Practice in Supreme Court: VERDICT AGAINST WEIGHT OF EVIDENCE.** The Supreme Court will not reverse a judgment because the verdict is against the seeming weight of the evidence, where there is evidence tending to support it.

*Appeal from Carroll Circuit Court.*—HON. J. M. DAVIS,  
Judge.

AFFIRMED.

*Hale & Sons* for appellant.

It appears from the evidence that respondent took possession of the land by mistake. He does not say that he claimed to that line, but that he claimed that to be the true one. "If any one by mistake inclose the land of another and claim it as his own, his actual possession will work a disseizin, but if ignorant of the boundary line he makes a mistake in laying his fence, making no claim, however, to the land to the fence, but only to the true line as it may be subsequently ascertained, his possession is not adverse.

*Wallbrun v. Ballew*, 68 Mo. 164; *Cole v. Parker*, 70 Mo. 372; *Acton v. Dooley*, 74 Mo. 63; *Hamilton v. West*, 63 Mo. 93.

*John L. Mirick* for respondent.

The facts of this case are identical with the facts in the case of *Cole v. Parker*, 70 Mo. 372, and the case of *Hamilton v. West*, 63 Mo. 93. The conflict, if any, between the testimony of respondent and appellant, was passed upon by the court trying the case, and this court will not disturb the finding.

NORTOX, J.—This action of ejectment commenced in the circuit court of Carroll county, on the 19th day of November, 1879, to recover the possession of twelve acres of land off of the east side of the southeast quarter of the northwest quarter and the northeast quarter of the south-

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west quarter of section 29, township 52, of range 22. The petition is in the usual form and the answer a general denial.

The case was tried by the court without the intervention of a jury, and judgment rendered for the defendant from which plaintiff has appealed. It appears from the record that the plaintiff and defendant were coterminous proprietors, plaintiff having the admitted legal paper title to the southeast quarter of the northwest quarter, and the northeast quarter of the southwest quarter of section 29, township 52, range 22, which embraces the land sued for, and defendant being the admitted owner of the land adjoining the above on the east, viz: The southwest quarter of the northeast quarter and the northwest quarter of the southeast quarter of section 29, township 52, range 22. The contest arises from the fact that according to a survey made in 1879, defendant's fence extended over the line dividing the lands of the parties on to the land of plaintiff, so as to embrace the twelve acres sued for, and it is this twelve acres that plaintiff seeks to recover. Defendant resists plaintiff's right to recover, on the ground that he had been in the open adverse possession of the same for more than ten years before suit was brought, claiming the land inclosed by his fence as his own. It appears that the land owned by defendant was originally owned by one Adkinson, who, in 1859 or 1860, procured one Smith, the county surveyor, to run the line and that he located it where defendant's fence is now. Adkinson then set his fence on the north forty to the line as ascertained by that survey, where it has remained ever since; the fence on the south forty was set out to this line in the spring of 1869. Adkinson stated that he supposed the survey was a correct survey, and that he always claimed up to the Smith survey as the west line of his land.

There was a conflict between the evidence of witnesses as to whether defendant and those under whom he held, claimed the line run by Smith in 1859, to be the true line,



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and claimed the land inclosed by his fence to be his up to that line. It is conceded by counsel that the circuit court declared the law in the following instructions asked and given :

1. The patent and deeds read in evidence vest in the plaintiff a legal paper title to the land described in the petition, and if the court finds from the testimony that defendant was in possession of the same at the commencement of the suit as charged in the petition, the verdict or finding should be for the plaintiff, unless the court further finds that defendant and those under whom he claims, have acquired title to the same by adverse possession and limitation as hereinafter defined and evidenced.

2. The defendant has not shown any color or claim of title to the land in question, and in order to acquire title thereto by adverse possession and limitation he must show by a preponderance of testimony, and to the satisfaction of the court sitting as a jury, that he and those under whom he claims have had the actual, continuous, uninterrupted and adverse possession of the same for not less than ten years before the commencement of this suit, and unless the court does so find, the verdict should be for plaintiff.

3. If defendant and those under whom he claims entered on and occupied the land in question by mistake as to the true boundary line between the tract in suit and the adjoining tract or tracts, but only intending to claim to the true line as it might be subsequently ascertained, then such possession was, and is not, adverse to the true owner, and a title by limitation was not acquired thereby.

4. If the defendant within ten years before the commencement of this suit, and before he had had ten years' possession, stated to the plaintiff that he only claimed the land to the true line of survey between the land of plaintiff and defendant, and that he would be governed by the survey whenever a correct line was made, then his possession of the tract in dispute from that date would not be adverse to plaintiff, if on a correct survey, the tract in dispute

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should be ascertained to be part of the tract described by its numbers in the petition; although defendant may have, also, stated at the time, that he claimed the line to which he held to be the true one.

As the law governing the case was properly declared, and as there was evidence tending to establish the facts in the instructions upon which the right of the defendant to a verdict was predicated, we cannot interfere with it, even though it might seem to us that the verdict was against the weight of evidence, for the manifest reason that the judge who tried the cause and heard and saw the witnesses was in a better position to weigh the evidence than we are.

Judgment affirmed. All concur except Judge RAY, who, having been of counsel, did not sit.

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THE STATE V. COLLINS, *Appellant*.

1. **Practice, Criminal:** ARGUMENT OF COUNSEL, ORDER OF. It is a compliance with the requirements of Revised Statutes 1879, section 1908, for counsel for the State to open the argument in a criminal cause, followed by counsel for the defense, who is in turn followed by counsel for the State, thus alternating throughout, counsel for the State closing.
2. ———: JURY, SEPARATION OF. Under Revised Statutes 1879, section 1909, the court cannot, in the trial of a capital case, allow the jury to separate, nor can the sheriff nor his bailiffs permit it. Where such separation takes place the judgment will be reversed, although it does not appear that any juror was approached upon the subject of the trial, or that there was any ground of suspicion that they were moved by outside influences. NORTON, J., dissenting.
3. ———: INSTRUCTIONS. It is not error to refuse an instruction for murder in the second degree, where the evidence does not show the commission of that grade of offense.

*Appeal from Pike Circuit Court.*—HON. ELIJAH ROBINSON,  
Judge.

REVERSED.

W. O. Forrist for appellant.

(1) The court erred in overruling defendant's motion for a new trial, based upon the ground that no list of the names of forty persons, out of which the jury was to be selected, had been served upon defendant. R. S. 1879, §§ 1903, 1904. While a list of forty names was served upon defendant, it contained the names of but thirty-nine persons. There was no such man as R. L. Dinsmore on the list. The clerk substituted the name Dinslow on the list used for making challenges for Dinsmore contained on the list served. Such practice should not receive the sanction of this court. (2) It was error not to withdraw from the jury, by instruction, all evidence as to the finding and identification of the gun on defendant's premises. There was no proof of its ownership, or that defendant had any connection with it. (3) It was error to continue the case for twenty-four hours to enable a juror to visit his sick child. The court should have withdrawn a juror, discharged the entire jury and called a new one, or continued the cause. Nor does it make any difference that the record fails to show that defendant objected to this action of the court. It was a matter about which he could not speak, and should not have been called upon to do so. *R. v. Woolf*, 1 Chitty R. 401. (4) The court erred in not instructing the jury as to the law of murder in the second degree. There was evidence in the case tending to show hot blood, existence of a quarrel and absence of deliberation. It was the duty of the court to give such instruction whether asked or not. *State v. Branstetter*, 65 Mo. 149. The evidence required such an instruction. *State v. Andrew*, 76 Mo. 103. (5) It was error for the court to refuse to allow the entire argument on defendant's behalf to be made after it was begun, before additional argument was made for the State. It was violative of Revised Statutes 1879, section 1908. (6) The cause should be reversed, because the jury were allowed by

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their custodians to separate, and to stand and sit about the court room in close proximity to witnesses and others interested in behalf of the State, to read newspapers and drink whisky furnished by the officers, without the advice of a physician or the court.

*D. H. McIntyre*, Attorney General, for the State.

The order pursued in the argument of counsel is in strict compliance with the provisions of the statute regulating the order of trial. R. S. 1879, § 1908. The order in which counsel shall address the jury in criminal trials is a matter resting in the discretion of the court trying the cause, and unless it appears to have been exercised wrongfully and so as to injure a party, the Supreme Court will not interfere. *State v. Wallham*, 48 Mo. 55; Proffatt on Jury Trial, § 249, p. 308; Weeks on Attorneys, § 111, p. 210. It was not error to adjourn court from Wednesday until Thursday to allow one of the jurors to visit his home, under the charge of a sworn officer, to see his child, which was thought to be dying, the other jurors remaining in charge of another sworn officer at the place of trial. *Crockett v. State*, 52 Wis. 211; *State v. Cucud*, 31 N. J. L. 249; *State v. O'Brien*, 7 R. I. 336. It has been repeatedly held that the momentary separation of a juror from his fellows, though not in the presence of a sworn officer, will not vitiate the verdict where no facts exist which raise a suspicion that he may have been tampered with. *State v. Bell*, 70 Mo. 633, and cases cited; *State v. Conway*, 23 Minn. 291; *State v. Wart*, 51 Ia. 587; *McCarter v. Comm.*, 11 Leigh (Va.) 633; *State v. Turner*, 25 La. An. 573. Even a longer separation will not vitiate where it is shown as a fact that no abuse took place. *State v. Cucud*, *supra*; *State v. Harris*, 12 Nev. 414; *Westmoreland v. State*, 45 Ga. 282. Nor is it necessary that the jury should always be kept together in a body in the same room. The law is complied with if they are, as a matter of fact, kept in the presence of each

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other and not allowed to come in contact with strangers. The officer need not be present in the room with them, but should see that they are not tampered with. *Comm. v. Shields*, 2 Bush (Ky.) 81. The fact that some of the jurors read newspapers containing a part of the evidence given on the trial, and read such evidence, even, is no cause for a new trial. *State v. Cucuel, supra*. In this case no part of the evidence was read. *U. S. v. Reid*, 12 How. 361. It is also urged, as a ground for a new trial, that the jurors, during their deliberations, had and drank intoxicating liquors. It is shown by the affidavit of the deputy sheriff that they had but little whisky; that not enough was drunk to affect any one of them, and that it was not furnished by improper parties. It has been uniformly held in this State that moderate use of intoxicating drinks by a jury, when not coming from an improper source, will not be grounds of new trial. *State v. Baber*, 74 Mo. 292, and cases cited; *State v. Cucuel, supra*; *Westmoreland v. State, supra*. There was no evidence upon which to base an instruction for murder in the second degree.

HENRY, J.—At the September adjourned term of the Pike circuit court, 1883, the defendant was indicted for the murder of Owen Utterback, and a trial of the cause at the March term, 1884, of said court, resulted in his conviction of murder in the first degree, and from the judgment on said verdict he has prosecuted his appeal. The points relied upon for a reversal of the judgment are numerous, but we do not deem it necessary to notice any of them except the following: 1st, That the court erred, in not instructing the jury as to the law of murder in the second degree. 2nd, That the jury were allowed by the officer in charge of them to separate after the trial commenced; and 3rd, Alleged error is based upon the order of argument to the jury, allowed by the court.

The latter point will be first noticed.

After the evidence was closed and instructions given



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to the jury, an attorney for the prosecution made the opening argument to the jury, at the conclusion of which defendant's counsel insisted that when they commenced their argument to the jury they should be permitted to consume the entire time allowed them, three and a half hours, without interruption, having arranged that each of three counsel for defendant should address the jury. The court refused this demand. The statute declares that:

"Unless the case be submitted without argument, the counsel for the prosecution shall make the opening argument, the counsel for the defendant shall follow, and the counsel for the prosecution shall close the argument." R. S., § 1908. The substance of the provision is, that the State shall have the right to open and close the argument, and, in this case, an attorney for the State opened the argument and was followed by one of defendant's counsel, and he by an attorney for the State, and this order was observed, until the conclusion of the argument by the prosecuting attorney. We see no objection to this practice, and do not think it in conflict with the section above quoted.

With respect to the separation of the jury complained of, the facts are that after the State had introduced her evidence in chief, and while Mr. Clark, one of defendant's counsel, was stating his case to the jury, the court postponed further proceeding in the cause, and permitted one of the jurors to go home, a distance of eighteen miles in the country, to see his sick child, reported to him as being in a dying condition. He was accompanied by and returned next morning with the sheriff. Again, on the afternoon of Wednesday, and while said cause stood adjourned until the next day, and after the evidence on the part of the State had been introduced, nine of said jurors were in the court room and three others were at the hotel, neither in the custody of nor attended by any bailiff, or other officer of the court. That after these nine left the court house, one of them, Oscar Cooper, came back into the court room unattended by an officer of the court, and, getting a news-

paper, left the room. On the same afternoon, the jury came through the public room of the hotel, on the way to their room, and one of them, E. K. Smith, instead of going with the others to their room, took a seat near Henry Henderson, one of the State's witnesses, and held a conversation with him lasting two or three minutes.

Section 1909, Revised Statutes, provides, that: "With the consent of the prosecuting attorney and the defendant, the court may permit the jury to separate at any adjournment, or recess of the court during the trial, in all cases of felony, except in capital cases; and in misdemeanors, the court may permit such separation of the jury of its own motion." In a capital case, therefore, the court cannot permit the jury to separate, even with the consent of the prosecuting attorney and the accused. The court in this case did not permit it, except in the instance of the juror whose child was sick, but the sheriff did, and the reasons for forbidding the court from allowing a separation of the jury, in a capital case, apply with equal force to such separation of the jury permitted by the sheriff, to whose custody they are committed, with an injunction of law to keep them together. No intentional wrong is imputed to the sheriff, or his bailiffs, but from the inadvertence or misconception of their duty, they permitted what the circuit court, by an order of record, could not have allowed, even if asked by both the State and the accused. It does not appear that any of the jurors were approached on the subject of the trial, nor is there any ground for a suspicion that they were moved by outside influences, but it was what might possibly be accomplished to the prejudice of the accused, if the jury were allowed to separate, which prompted the imperative requirement of the statute, that, in capital cases the jury shall be kept together.

Section 1909 is a new section enacted in 1879, and no antecedent adjudications of this court are applicable to this case. Where similar questions have arisen in this State, it was in cases in which the court could have permitted a

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separation of the jury. Our view of the import of the section is strengthened by section 1966, which authorizes the trial court to grant a new trial "when the jury has been separated without leave of the court, after retiring to deliberate upon their verdict," even in cases in which the court might have allowed such separation, and without proof that the defendant was prejudiced by such separation, or that the jury was guilty of any misconduct.

With respect to the failure of the court to give an instruction relative to murder in the second degree, the defendant's own testimony is the only evidence in the case relied upon as warranting such an instruction. He testified that he had several times heard that Utterback had circulated slanderous reports about his wife, who asked him to see Utterback, and get him to cease. That on the day he killed Utterback, he started out on foot to hunt a cow he had lost which he had bought of Mr. Butler, who lived near Utterback. That he took his rifle with him to kill squirrels. He lived eight or nine miles from Butler and Utterback. He went to Butler's for his cow, and, being in the neighborhood, thought he would call on Utterback and get him to stop talking about his wife. Had no idea what he, defendant, would do. He went to Utterback's, not to his house, but to his fence, between his barn lot and Butler's cornfield. When he first saw Utterback, he was digging in his pond, with his back to defendant, who walked up to a low place in the hedge and called to him. Utterback turned, looked at defendant, threw down his spade and put his hand in his right hand pantaloons pocket as if to draw a pistol, and thinking Utterback would kill him, defendant shot him. There was evidence to the effect that these men had been enemies for several months, and that on a former occasion defendant had presented a pistol at Utterback, threatening his life, and this was after he had heard that Utterback had slandered his wife. But, as this cause will have to be retried, we forbear to comment upon

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the evidence, any further than to say that it did not authorize an instruction as to murder in the second degree.

The testimony in relation to finding the rifle at defendant's house was properly admitted.

I incline to the opinion, that the court erred in permitting the juror to separate from his fellows to go back to his sick child. The statute is imperative, and the proper practice in such case would seem to be, to withdraw the juror, discharge the jury, and call another or continue the cause, but we decline, at present to pass definitely upon that question.

For the misconduct of the sheriff and his baliffs, in permitting the jury to separate, the judgment is reversed and the cause remanded. All concur except NORTON, J., who dissents.

NORTON, J., DISSENTING.—I do not concur in the action of the court in reversing the judgment in this case, inasmuch as it overthrows a rule which has been the accepted law of this State ever since the case of *Whitney v. State*, 8 Mo. 165, was decided in 1843. It was held in that case, the opinion being rendered by Judge Napton, and concurred in by Judges Scott and Tompkins, that the mere separation of the jury was not sufficient to authorize a reversal of the judgment. This rule was adhered to in the cases of *State v. Mix*, 15 Mo. 153; *State v. Barton*, 19 Mo. 227, also in the case of *State v. Igo*, 21 Mo. 459, where the court was asked to reverse the judgment on the ground that after the jury had retired from the bar to consider of their verdict, one of the jurors was seen on the street, unattended by an officer in conversation with a by-stander, and Judge Leonard, who delivered an able and exhaustive opinion, said that "the only matter for our judgment is the naked, dry question, whether this separation of the juror from his fellows, is of itself, without anything further, a sufficient ground to set aside the verdict, and we are all clearly of the opinion that it is not. \* \* This

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court has heretofore acted upon the same principle, and we are not disposed to depart from it. Indeed, we think no other rule could be adopted on the subject, consistent with a proper and efficient administration of the law. When the verdict is such as the court thinks ought to have been rendered upon the law and evidence, and no improper influence has been exerted, in any manner, over the jury, nor any just grounds for suspecting any such influence, it would seem to be but trifling with the administration of the criminal law of the land, to set aside a verdict upon the mere possibility that the jury may have been improperly influenced."

And in the case of *State v. Carlisle*, 57 Mo. 102, where the defendant was convicted of murder in the first degree, and the principal objection urged for a reversal of the judgment was based on the ground that the court permitted the jury to separate after they were impanelled, and whilst the evidence was being introduced, this court refused to interfere with the judgment, Judge Wagner observing that "the rule has been consistently acted upon in this State that a mere separation of the jury will not vitiate a verdict unless it be made to appear that the jury has been tampered with, or that they have been guilty of misconduct." The same doctrine is maintained in the following cases. *State v. Harlow*, 21 Mo. 446; *State v. Brannon*, 45 Mo. 330; *State v. Matrassey*, 47 Mo. 295; *State v. Dougherty*, 55 Mo. 69 and *State v. Bell*, 70 Mo. 633. In the last of the above cited cases the opinion was delivered by Napton, J., in which all the judges concurred, and in which the doctrine as announced in the case of *State v. Carlisle*, 57 Mo. 102, is expressly sanctioned and approved, and the cases of *Whitney v. The State*, and *State v. Igo*, *supra*, are cited in support of the ruling there made.

The case before us does not lose its analogy to the above cited cases simply because the statute requires the jury in a capital case to be kept together. All the cases proceed upon the ground that the separation of the jurors was



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wrongful and unlawful, but that inasmuch as it did not appear that the juror separating himself from his fellows had been tampered with, nor been guilty of other improper conduct, nor subjected to improper influences, the mere separation would not justify a reversal of the judgment in a case when the verdict was supported by the law and evidence. That the evidence fully supports the verdict I think clear, for it is said in the opinion, that the evidence of the defendant who was examined as a witness, did not justify giving an instruction for murder in the second degree, and the other evidence in the record abundantly sustains the finding.

It is conceded in the above opinion of the court that "it does not appear that any of the jurors were approached on the subject of the trial, nor is there any ground for a suspicion that they were moved by outside influences," thus bringing the case directly within the principle announced in the cases cited, all of which the opinion virtually overrules, without the citation of a single authority upon which to base it.

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HOLTON *et al.* v. KEMP, *Plaintiff in Error.*

1. **Practice in Supreme Court: PRESUMPTION.** In the absence of affirmative evidence to the contrary, the Supreme Court will presume in favor of the ruling of the trial court, which has admitted a patent in evidence after inspection, that the certificate as it then was disclosed the requisite authentication.
2. **Deed, Alteration of.** It will be presumed, in the absence of proof to the contrary, that an apparent alteration of a deed was made before the final execution and delivery of the instrument. If there be suspicious circumstances on its face, it is for the trial judge to determine from inspection whether they be such as to require the party offering the deed to explain them.
3. **Deed: ALTERATION: WHEN QUESTION SUBMITTED TO JURY.** When the trial judge submits the question of such alteration with the in-

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strument itself, and the proof to the jury, it is a question of fact for their determination, and their finding, as on any other question of fact, is conclusive.

4. ———: **ACKNOWLEDGMENT: STATUTE.** The provision of our statutes requiring an officer taking an acknowledgment of a deed to certify that the grantor was personally known to him, was first enacted February 14th, 1825, (Laws, p. 215, § 10,) and hence did not apply to a deed acknowledged prior thereto.

*Appeal from Linn Circuit Court.*—HON. C. BOARDMAN, Special Judge.

REVERSED.

*A. W. Mullins* for plaintiff in error.

The copy of the patent from the United States to Christian Purth *alias* Porth, should not have been admitted in evidence. It was not attested or certified as required by law, in order to render it admissible in evidence. 1 R. S. 1879, §§ 2285, 2286; *Patterson v. Winn*, 5 Pet. (U. S.) 233. The deed from Christian Purth or Porth to Frazier should have been excluded. Its acknowledgment was insufficient under both the laws of Ohio and of this State. The plaintiffs having failed to show the legal title to the land, and having no right based on prior possession, the demurrer to the evidence should have been sustained. *Foster v. Evans*, 51 Mo. 39; *Large v. Fisher*, 49 Mo. 307. The court erred in excluding the sheriff's deed to defendant, and the judgment in connection therewith. *Lenox v. Clarke*, 52 Mo. 115; *Townsend v. Cox*, 45 Mo. 401.

*C. L. Dobson* for defendant in error.....

The objection to the copy of the patent to Christian Purth *alias* Porth, was not well taken. The lower court found as a matter of fact that it was properly certified, and an inspection of the paper now will satisfy this court that the action of the lower court was right, especially in view of the fact that defendant claims under the same source of

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title. The deed from Porth to Frazier was acknowledged according to the laws of Ohio, and this is sufficient. R. S. 1879, §§ 702, 703. But even if the objections made to the copy of the patent and the deed to Frazier were well taken, they would not avail the defendant in this action. The evidence offered by him shows conclusively that he claims only such title as the plaintiffs had—a common source of title. Therefore plaintiffs are entitled to recover. *Holland v. Adair*, 55 Mo. 40; *Butcher v. Rodgers*, 60 Mo. 138. The court found, as a matter of fact, that the alleged change of the name of “Porth” to “Purth,” was made before the signing of the deed, and this court cannot review such finding.

PHILIPS, C.—This is an action of ejectment for the recovery of the possession of the southwest quarter of section 30; in township 57, range 18, situate in said county of Linn.

The answer tendered the general issue. It also pleaded that the plaintiff, Thos. J. Holton, jr., is a minor and has no legal capacity to sue. The petition was amended by striking out the name of Sabina B. Holton.

The plaintiff at the trial offered the following evidence:  
1.: Copy of a patent, calling for the land in controversy, from the United States to Christian Purth *alias* Porth. To this patent the defendant interposed the objection that it was not certified to be a copy of the record of the original patent, nor to be a copy of the record of the patent, nor that it is an exemplification, etc. This objection was overruled by the court, and the patent admitted in evidence. In the transcript certified by the clerk to this court, after copying this patent, he states: “Certified to be a copy by Josiah Meigs, commissioner. Most of the writing unintelligible and defaced so it cannot be copied.”

2.: Deed from Christian Purth or Porth to James E. Frazier. This deed was objected to by defendant for the reason that, the letter “o” in the signature of Porth to the

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deed appeared to have been changed into the letter "u." In support of this objection the defendant introduced as a witness S. P. Huston, Esq., who testified that he was a practicing attorney at law, that in the name attached to said deed the word Porth had been changed by inserting the letter "u" where the letter "o" had been written. He could not tell whether this had been done before or after acknowledgment. The defendant further objected to the admission in the evidence of this deed, because the same was not properly acknowledged. The certificate of acknowledgment is as follows:

"State of Ohio, City of Cincinnati.

Before the subscriber, Mayor of the city of Cincinnati, State aforesaid, personally came Christian P. Purth the grantor in the within deed named, and acknowledged the same to be his voluntary act and deed for the uses and purposes therein mentioned.

in testimony whereof, I have hereunto subscribed my name and affixed the seal of said city, this 16th day of July, 1821.

(L. S.)

(Signed) ISAAC G. BURNET, Mayor."

In connection with the offer of said deed the plaintiffs put in evidence certain statutes of the State of Ohio, which will be noticed in the course of this opinion. They also put in evidence "An act to incorporate the town of Cincinnati" etc., approved February 5th, 1819, the 12th section of which authorized the mayor to take and certify the acknowledgment of such deeds. The defendant claims that said acknowledgment is neither good under the laws of this State, or of the state of Ohio. The court admitted the deed in evidence.

3. Plaintiffs read in evidence a deed from said Frazier to Arthur Martin, and from Martin to Thomas J. Holton. This was followed by proof showing the death of said Thomas J. Holton, and the heirship of the plaintiffs, the women as children, and the husbands who are joined as

husbands. The said Thomas J. Holton, jr., was a minor at the time the suit was brought, but had attained his majority at the time of trial. Plaintiffs gave evidence of the fact of the defendant being in possession at the time of the institution of this suit, and of the payment of taxes on said land, by the ancestor in his life time, and by his legal representatives since.

The defendant offered in evidence a judgment against the plaintiffs under which the land in controversy was sold, and a sheriff's deed thereunder to defendants, executed on the 7th day of June, 1877, which the court on plaintiff's objection excluded. The court found the issues for the plaintiffs, and rendered judgment accordingly. Defendant has brought the case here on writ of error.

I. The objection to the admission in evidence of the patent we do not think tenable. It appears from the brief of plaintiffs' counsel, that the patent read in evidence has been filed in this court for inspection, but if so it cannot be found. Whether the certificate to the patent was in the same condition when offered in evidence as when the clerk made out the transcript for this court is matter of conjecture. In the absence of affirmative proof touching this matter, we are of opinion that it should be presumed, in favor of the action of the trial court admitting it in evidence after inspection, that the certificate as it then was disclosed the requisite authentication.

II. The alleged alteration in the name of the grantor, Purth, in the deed to Frazier, was not, in our opinion, such as to have justified the court in its exclusion. There is much conflict of authority on this branch of evidence, but the rule in this State seems to be pretty well settled. It is to presume, in the absence of proof to the contrary, that the apparent alteration was made before the final execution and delivery of the instrument. *Mathews v. Coalter*, 9 Mo. 696; *Paramore v. Lindsey*, 63 Mo. 63. If there be suspicious circumstances on the face of the instrument, it is for the judge trying the case to determine from inspection



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whether it be such as to require the party offering it to explain the matter.

When he submits the question, with the instrument itself and the proofs to the jury, it is a question of fact for their determination, and their finding, as on any other question of fact, is conclusive. Authorities *supra*; 1 Greenlf. Ev., § 564 and notes. The only suspicious fact on the face of this signature, as testified to by the witness, Huston, was his impression that the ink used in making the letter "u" was different from that employed in making the other letters. But in the acknowledgment, the officer certified that Christian Purth was the "grantor named within the deed, and acknowledged the same to be his voluntary act and deed." The court after inspecting the deed and hearing the evidence was satisfied that the alteration was not made after acknowledgment, which was the crowning act of execution in conjunction with its delivery. Under the circumstances we would not feel justified in reviewing this finding of the court.

III. In respect to the acknowledgment of the deed, the plaintiffs conceded at the trial, and make the same concession here, that it was not properly certified under the laws of this State; and then undertook to sustain it as being a good acknowledgment under the laws of Ohio where taken; and if good by the law of that state, it being military bounty land, the proof was admissible under sections 702, 703, Revised Statutes 1879. To show that the acknowledgment was good by the law of Ohio, the plaintiffs put in evidence a statute of that state. This statute, however, required the acknowledgment to show that the officer taking it was "satisfied from personal knowledge, or from the testimony of some witness, that the person is whom he represents himself to be." So the acknowledgment would confessedly be bad under this statute. To obviate this objection, plaintiffs' counsel, in his argument, asserts that that part of said Ohio statute was repealed long prior to the date of this acknowledgment. This posi-

tion is not supported by the facts. The first statute was enacted June 1st, 1831. Swan & C. St. 1860, p. 458. The said repealing statute was passed January 29th, 1833. Same St., p. 470. Whereas the acknowledgment in question was taken and certified July 16th, 1821, before the enactment of either of the statutes relied on by plaintiffs. The statute of Ohio, in force when the acknowledgment was taken, was enacted February 24th, 1820. St. of Ohio, vol. 2, pp. 219, 220. By this statute the certificate was not required to state that the grantor was known to the officer. But this statute was not put in evidence, and we cannot take judicial notice of it. But was not the acknowledgment sufficient under the statute of this State? The law then in force was enacted December, 1815. Vol 1, Ter. L. Mo., p. 422, § 1. It is provided that "all such deeds and conveyances made and executed by such person or persons, not residing in this territory, as shall be acknowledged or proved before any mayor, chief magistrate or other officer of any city, town or place, where such deeds or conveyances are or shall be made or executed, and certified under the common or public seal of such city, town or place, where they have a public seal, if not, under the private seal of such mayor, etc., shall be as valid and effectual in law as if the same had been acknowledged or proved before any judge of the superior or circuit courts in this territory," etc. This acknowledgment was good under this statute. The provision requiring the officer to certify that the grantor was personally known to him, was first enacted February 14th, 1825. Laws of Mo. 1825, p. 218, § 10.

IV. The judgment and sheriff's deed offered in evidence by the defendant, and excluded by the court, are the same judgment and deed passed on by this court at this term in the case of *Holton v. Towner*, ante, p. 360. For the reasons therein assigned, the court erred in excluding said evidence.

The judgment of the circuit court is, therefore, reversed and the cause remanded. All concur.

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Carter v. Davis.

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CARTER V. DAVIS *et al.*, Appellants.

**Deposition:** SECONDARY EVIDENCE, WHEN NOT ADMISSIBLE. Secondary evidence of the contents of a deposition cannot be read in evidence when the original has not been returned into court nor filed in the cause.

*Appeal from Jasper Circuit Court.*—HON. JOSEPH CRAVENS, Judge.

REVERSED.

C. A. Winslow and L. P. Cunningham for appellant.

The court committed error in permitting, against defendant's objection, the copy of the deposition of Corn to be read in evidence. The original had not been returned or filed in the cause, and secondary evidence of its contents was inadmissible. *Mincke v. Skinner*, 44 Mo. 92; *Finney v. St. Charles College*, 15 Mo. 266; R. S., § 2157.

E. J. Montague for respondent, cited *Rhodes v. Outcalt*, 48 Mo. 367.

RAY, J.—This suit was commenced in the circuit court of Newton county, Missouri, February, 1877, but the venue thereof was afterwards changed, by consent, to the circuit court of Jasper county, where the cause was tried. The controversy is about a certain forty acres of land, situated in said Newton county, described as the southeast quarter of the northwest quarter of section 20, township 27, range 32, otherwise known as the "Johnson forty." The defendants are in possession thereof, claiming it adversely to the plaintiff.

Samuel B. Corn, is the common source of title. Said Corn, on July, 20th, 1874, mortgaged the land in question with other lands, to plaintiff, with a power of sale in the mortgagee to secure his note of that date to plaintiff for the sum of \$2,500. This mortgage was filed for record in

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Jasper county August 1st, 1874, but was not filed for record in Newton county where the "Johnson forty" (the land in question) is situated, until September 11th, 1875. Plaintiff, Carter, as such mortgagee, duly advertised the land for sale and at the sale thereof, on June 17th, 1876, E. J. Montague became the purchaser thereof, and received from plaintiff a deed therefor, dated June 27th, 1876. Said Montague and wife, about that time, conveyed said land, by quit-claim deed, back to the plaintiff. Said Montague was acting as attorney for plaintiff, in and about the matter, and testifies that no money was in fact paid by either himself or the plaintiff.

June 11th, 1875, Corn and wife executed a deed of trust on the land, with a large lot of other lands, to Edmund T. Allen, to secure some seventy-two notes, aggregating about \$8,000 in value, due some nine different business firms in St. Louis, Chicago and New York. The following clause was interlined in said deed of trust. "The above property, being subject to several incumbrances, duly recorded"—but the evidence showed that the clause was inserted prior to the execution of said deed. This deed of trust was recorded in Newton county, July 9th, 1875, or two months prior to the recording of the plaintiff's mortgage. The defendant, Davis, purchased at a sale of said land by said trustee, under said deed of trust to Allen, on May 26th, 1876, and obtained a deed therefor. Said Corn and wife, on September 7th, 1875, also, conveyed the land, by quit-claim deed, to the defendant, Cassil, who paid therefor, as he testifies, a small or nominal consideration. Defendant, Cassil, conveyed the land to defendant, Davis, by quit-claim deed, dated April 1st, 1876. The evidence did not disclose what interest defendant, Cahn, had in the land, but the answer admitted a conveyance by defendant, Davis, of an interest therein to his co-defendants. The petition charges that the trustee and beneficiaries in the deed of trust to Allen and the defendants, all acquired their interest in the land in suit, subject to the plaintiff's

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said mortgage from Corn and wife, and with actual notice thereof. The relief sought by this action is to postpone the lien of the Allen deed of trust on the forty acres in controversy, to the lien thereon of the mortgage to the plaintiff; to set aside the deed of the trustee to defendant, Davis, for said forty acres, and to divest the defendants of all title thereto, and to vest the same in the plaintiff. The other averments thereof we deem it unnecessary to set out.

The answer, so far as we deem it material to notice, denies all allegations in the petition of any notice by defendants of plaintiff's said mortgage, and sets up that they are innocent purchasers for value, having first recorded the deed under which they claim, and paid the purchase money, without notice of plaintiff's claim. The circuit court found the issues for the plaintiff, and the defendants have appealed to this court from the judgment decreeing the relief prayed for. As the Allen deed of trust, under which the defendants claim, was first of record, it is *prima facie* superior to the mortgage of the plaintiff, and the main question in the case is, as to the actual knowledge of those claiming under said Allen deed of trust.

Upon the trial the court permitted the plaintiff to read, against the objection of defendant, a copy of the deposition of said S. B. Corn, under the following circumstances, as shown by the bill of exceptions:

"Plaintiff by his attorney, Judge Montague, then proposed to read, what he stated to be an abstract of the deposition of Samuel B. Corn, taken by defendants, having previously served notice on defendants, requiring them to produce said deposition upon the trial, when defendants' attorney presented a copy of said deposition, which was read in evidence by plaintiff's attorney as plaintiff's testimony. Defendants objected because the original deposition had never been filed in the cause, and never was a part of the record in the cause, and the original deposition was the best and only evidence of its contents. All these objections were overruled by the court, to which defendants duly



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excepted at the time. It was admitted that the original deposition was never filed in the cause, nor among the papers in the cause, but the last known of it was when the same was completed by the notary public in Pennsylvania, who took it on the 31st of July, 1877."

The action of the court, in this behalf, is pressed upon us as error for which the judgment should be reserved. Our statute, Revision 1879, chapter 26, page 352, provides, that any party to a suit, pending in any court in this State, may obtain the deposition of any witness to be used in such suit, conditionally. § 2130. If the witness, as in this case, resides out of the State, the party desiring his testimony, may sue out of the court in which the suit is pending, or out of the office of the clerk thereof, a commission to take the deposition of the witness. § 2131. The statute specifies the officers, by and before whom such deposition may be taken. § 2133. The commission authorizes and empowers the officer to cause to come before him, such person or persons as shall be named to him, by the parties suing for the same, and commands such officer to examine such person, touching his knowledge of anything relating to the matter in controversy, and to reduce such examination to writing and return the same, annexed to the commission, to the court wherein, or the justice before whom the action is pending, with all convenient speed. § 2135. Section 2138 requires notice in writing of the time and place of taking such deposition to be given to the adverse party. By section 2151, it is required that to every deposition or examination, taken by virtue of this law, shall be appended the certificate of the person or officer, by or before whom the same shall be taken, showing that the deposition or examination was reduced to writing in his presence and sworn thereto by the witness, at the place at which and the day, and within the hours, wherein the same was taken. Section 2157 then provides that examinations or depositions, taken and returned in conformity to the provisions of this chapter, may be read and used as evidence

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in the cause in which they shall have been taken, as if the witnesses were present and examined in open court on the trial thereof, etc. First, if the witness resides or is gone out of the State, etc. We may remark in the first place, that a paper or document, wanting in any one of these essential elements or requirements of the statute is not a "deposition" within the meaning of the statute, and is not admissible in evidence as such. We need not say that where there is no original there can be no copy.

It is not sufficient to authorize the admission of such a paper or document in evidence as a deposition to show that it has been properly taken and authenticated in conformity to the requirements of the statute, but it must also appear that it has been returned to the court wherein, or the justice before whom the action is pending. Until such return there is no legal deposition, such as is contemplated and required by the statute. Where there is no legal deposition, there can be no legal copy. In such a case, the original of such a paper, or document, is clearly not admissible in evidence, and for a still greater reason a copy thereof is not securable. The return of the deposition is as much one of the essential elements and requirements of the statute, as any other provision authorizing and permitting the same to be read. The return authorized and required by the statute, not only includes the proper authentication of the officer, showing how and in what manner he has executed the commission, but also includes the manual or physical return and delivery of the deposition so taken and authenticated to the court or clerk, issuing such commission, and authorizing such deposition to be taken. This return and delivery to the court or clerk may be by the officer himself, or he may transmit the same by messenger or mail properly sealed up and directed. It is further held by the adjudications, where the clerk of the court receives a deposition transmitted by mail, messenger, or delivered by the officer taking the same, it is his duty to file the same in the cause, and so indorse it, after which it is treated as a record in the

cause. Such, at least, is the regular and ordinary practice in such cases. Weeks' Law of Depositions, Chapter 9, page 412 to 435, and sections 343, 344, 355 and 362.

It is conceded that, when a deposition has once been properly taken and regularly returned, in conformity to the requirements of the statute, and filed in the cause, that it is then admissible in evidence. It is also conceded that, if, in such case, the party taking the deposition declines to use it, the adverse party may read it in evidence. It is further admitted that a copy of a deposition, so taken and returned, and filed in the cause may also be read in evidence upon proof of the loss or destruction of the original. It is, also, held that depositions so taken in another cause between the same parties, may also be read in evidence, and that copies thereof are likewise admissible upon proof of the loss or destruction of the originals. The authorities in this State and other courts are abundant on these points and to this effect. This, we think, is the full extent, to which the authorities go on these questions. After considerable search among the authorities and text writers, I have not been able to find a case where an original document, not thus taken and returned, or a copy thereof, has been held admissible in evidence as a deposition; nor have we been cited to any such case in brief of counsel. We apprehend that such is not the law, and never has been the practice. *Grinnan v. Mockbee*, 29 Mo. 346; *Mincke v. Skinner*, 44 Mo. 93; *Greene v. Chickering*, 10 Mo. 109; *Finney v. St. Charles College*, 13 Mo. 267; *Samuel v. Withers*, 16 Mo. 532; *Parsons v. Parsons*, 45 Mo. 266; *Adams v. Raigner*, 69 Mo. 363.

In 29 Mo. 345 *supra*, on pages 346, 347 it is said that: "When a party relies on a deposition, he must, before he can be permitted to use it as evidence, show all the facts upon which its admissibility depends." In 44 Mo. 93 the head note is as follows: "A paper, purporting to be a deposition, which does not show in what cause it was taken, or whether with or without notice, or who was present examining and cross-examining, and was not filed

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in any particular cause, has none of the elements of a deposition, and should be rejected when offered in evidence." In *Greene v. Chickering*, *supra* it is said, that "a deposition taken by one party to a suit, when filed, may be read by the other, in evidence," etc.

In *Finney v. St. Charles College*, 13 Mo. 267, where it appeared that the record of a suit, including the original deposition, was lost or mislaid, it was held that: "Whenever a deposition taken in a former suit is admissible in evidence in a subsequent suit between the same parties, a copy may be read upon proof of the loss of the original." In *Adams v. Raigner*, 69 Mo. 363, it appeared that Raigner was permitted, against the objections of Adams, to read in evidence a certain deposition, taken and filed in a former suit, etc., and it was there simply held that said deposition, so taken and filed in the former suit, was admissible in the latter suit, without being filed in the latter suit, and without other notice being given of its intended use, provided no surprise is worked thereby. In that particular, it only overruled former cases, where it had been held that such a deposition, to be admissible in another suit, could not be used, unless first filed in the latter suit, or notice thereof given of its intended use. In other respects it does not differ from former adjudications of this court, or countenance the reading of a deposition that had never been taken, returned and filed in the cause in which it was so taken.

In the case at bar, it will be observed that it is admitted that the original document or paper, the copy of which was offered and read in evidence in this cause, was never filed in the cause, nor among the papers in the cause; and that the last known of it was when the same was completed by the notary in Pennsylvania on the 31st of July, 1877. It is manifest, from such admissions, that said original had never been returned as required by law. We conclude, therefore, that the admission of said copy, under the circumstances stated and admitted, was error, for which the

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judgment should be reversed and the cause remanded for further trial.

It will be time enough to pass upon the various questions presented by this record, when the case has been properly tried upon competent evidence. In the absence of such a trial, we cannot assume to consider and pass upon the merits of the case, as, until then, we cannot judicially know what those merits are.

For these reasons, the judgment of the circuit court is reversed and the cause remanded. All concur, Norton, J., in the result.

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THOMAS V. LIEBKE *et al.*, *Appellants*.

1. **Negotiable Note:** MAKER: PAYEE: INDORSEE: COMPOSITION. An accommodation maker of a negotiable note is not barred of his remedy against the payee and indorsee, by reason of a composition with the latter's creditors to which the maker of the note was not a party.
2. ———: CLAIM OF MAKER. In such a case the claim of the maker is not a claim upon the note, and is distinct from the claim proved up in the bankruptcy proceedings by the holder of the note.
3. ———: ———: PAYMENT. It is immaterial that the maker's claim was not matured by a payment of the note at the date of the composition agreement.
4. **Bankruptcy Proceedings, Discharge in:** ALLOWANCE TO SURETY. Where there is no general discharge in bankruptcy proceedings, the statutory provision limiting the allowance to a surety, does not apply.
5. **Principal: SURETY: RECOURSE.** To deprive a surety who has paid his principal's debt of a recourse upon the principal, the provision must appear in distinct terms, and must be strictly construed.\*

*Appeal from St. Louis Court of Appeals.*

**AFFIRMED.**

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\* These syllabi are taken from 9 Mo. App. 424.



*G. M. Stewart* for appellants.

*Brown & Young* for respondent.

RAY, J.—This action was commenced in the St. Louis circuit court, where the defendant had judgment, from which the plaintiff appealed to the St. Louis court of appeals, where the judgment of the circuit court was reversed and the cause remanded, from which last judgment the defendant has appealed to this court. The case is reported in 9 Mo. App. 424, where the opinion appears in full. We have examined that opinion, with its reasoning and authorities, and believe it to be a correct and just application of the law to the facts of the case. We have also considered the arguments and briefs of counsel made and filed in this court, but fail to find therein any sufficient reason to depart from the rulings of the court of appeals. Its judgment reversing that of the circuit court and remanding the cause, is, therefore, affirmed. All concur, except HUGH, C. J., absent<sup>+</sup>

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CRUCE, *Executor*, v. CRUCE *et al.*, *Appellants*.

1. **Executors: INTEREST: STATUTE.** Probate courts, under Revised Statutes 1879, section 232, possess the power of courts of equity in relation to the interest to be charged against executors and administrators in favor of the estate, and they being regarded in equity as trustees, the court will follow, as to them, the practice which prevails in equity in charging trustees with interest.
2. **Equity: ACCOUNTING: INTEREST.** While in equity there never was an absolute rule governing the rate of interest, or the liability to pay compound interest, yet the following may be stated as underlying principles with which all rules and orders of accounting should conform as near as the circumstances of the case will permit: 1st, A trustee is accountable for all interest or profits actually received by him from the trust fund, whether used in his private business

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or otherwise employed by him. Under no circumstances will he be permitted to retain any benefit or advantage from the trust fund, except his compensation or commissions. 2nd, He is, at all events, accountable for such interest or profits as he might have obtained by the exercise of reasonable skill and exertion in the management of the fund whenever the character of his trust, or the relation which he holds to the fund requires him to make it productive. In all such cases he is, at least, accountable for such gains and profits, although the actual gains and profits may be less. All orders for periodical rests and for compounding interest should be adopted, not for punishing the delinquent trustee, but for the purpose of attaining the actual or presumed gains, and to make certain that nothing of profit or advantage remains to the trustee, except, perhaps, his commissions or compensation.

3. **Trustee: ACTUAL GAINS FROM TRUST FUND: BURDEN OF ACCOUNTING FOR: TRUSTEE'S SILENCE.** The burden of accounting for the actual gains and profits rests upon the trustee. If he fails or refuses to furnish evidence of them, he invites the rule which shall most nearly approximate his actual gains and leave no advantage or benefit to him by reason of his silence or refusal. When, notwithstanding his failure to disclose his profits, they are in fact known to the court by means of other evidence before it, the order of accounting should be framed with reference to approximating such gains, unless they should be less than a prudent management of the funds should have produced.
4. **Use of Trust Fund by Trustee: RATE OF INTEREST CHARGEABLE AGAINST HIM.** Where a trustee uses in his private business the trust fund, he is *prima facie* liable, at least, for the legal rate of interest for the use of money, that is that rate which the law attributes to contracts in the absence of stipulation on the subject. Where it appears in proof that the higher rate could easily have been obtained, the trustee should be accountable for such higher rate, always, of course, within the rates permitted by law.
5. **The proper method for calculating interest, upon the accounts of the executor in this case, stated.**

*Appeal from Henry Circuit Court.*—HON. F. P. WRIGHT,  
Judge.

REVERSED.

*M. A. Flyke* for appellant.

The executor should be charged with compound in-

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terest, because, by the will, he was appointed testamentary guardian of Agnes and Julius, which appointment he accepted, and continued to act in that capacity until they arrived at their majority. Hinekley's Testamentary Law, § 385, and cases cited; Reeves' Dom. Rel., 467, note; *White v. Parker*, 8 Barb. 48. By Revised Statutes, section 2564, guardians by will are in all things upon the same footing as guardians appointed by the court or chosen by the minor, except the latter shall have no right to choose another guardian, etc. Under Revised Statutes, section 2599, and General Statutes 1865, page 471, section 41, it was the duty of the guardian to have loaned the money of his wards at the highest legal rate, to be paid annually, and if not so paid, to become part of the principal and bear interest at the same rate.

*B. G. Boone* with *John F. Philips* for respondent.

The only material points at issue in this case are: First, whether the court below should have charged the executor with the sum of \$3,200 or \$4,100 on sale of land to Ming. The court charged the executor with \$3,200 on this sale, estimating the land at \$5 per acre. The evidence of Cruce, Ming, Salmon, Cock and Holland established, as we think, beyond controversy, that \$5 per acre was a full, fair and reasonable value for the land at the time of the sale; and computing interest thereon at ten per cent from date of sale until settlement in 1879, amounts to more than the land was worth at the time of the settlement, and shows that the sale was a beneficial and profitable investment for the appellants. That Cruce, and Ming estimated the land at \$5 per acre, is conclusively shown by their testimony. The consideration expressed in a deed is always open to explanation—is never conclusive. *Miller v. McCoy*, 50 Mo. 214; *Fontain v. Boatman's Sav. Ins.*, 57 Mo. 553; *Alltringer v. Capehart*, 68 Mo. 441. Under the evidence on this point, the court below acted correctly in

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declining to charge the executor with \$4,100, and properly charged him with \$3,200. Second, the second point at issue is, the rate of interest to be charged, and the rule of computing it. Under our statute, no specific rate of interest is required. The court shall exercise an equitable control in making executors and administrators account for interest received by them on debts due the estate, and for interest accruing on money belonging to the estate, loaned or otherwise employed by them, and for that purpose may take testimony, etc. *In re Davis*, 62 Mo. 450; R. S. 1879, §§ 231, 232; *Madden v. Madden*, 27 Mo. 544; *Hook v. Payne*, 14 Wall. 257. As to whether interest shall be charged at all, or, if charged, at what rate, is wholly within the discretion of the court in the exercise of its equitable jurisdiction of the case. And, unless that equitable discretion be improperly and unjustly exercised, this court, upon review, will not disturb it. It was the duty of the guardian to make annual settlements. R. S., § 2600. G. S., § 42, p. 471. This he failed to do; therefore, we claim that, as a matter of law, the guardian ought to be charged with ten per cent compound interest. It is contended by respondent that he is not testamentary guardian, but is simply executor, and should be held to account upon the same basis as an administrator. Even if this is so, according to the rules established by this court, he ought to be charged ten per cent compound interest. 1st, Because he has not made annual settlements of his accounts. 2nd, Because the testimony in the case clearly shows that the funds were used by respondent in his own business, and that he kept no separate account of his own money and that belonging to the estate. According to his own statement, he used the money as his own trading in hogs, and sold or traded a large body of land for a stock of dry goods, clearly bringing himself within the rule laid down by this court in a number of cases. *In the matter of the estate of Camp* 74 Mo. 192, and 6 Mo. Appeals, 563; *Williams v. Pettigrew*, 62 Mo. 460; *Barney v. Saunders*, 16 How.

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542; *Hook v. Payne*, 14 Wall, 252; 1 Am. Ld. Cases 523, 535; *Moore v. Beauchamp*, 5 Dana, 77; *Comeggs v. State*, 10 Gill & J. 186. 3rd, The testimony clearly shows that the respondent could have loaned the funds in his hands at ten per cent compound interest.

MARTIN, C.—This suit originated in the probate court of Henry county and commenced with certain exceptions taken by an executor to a final settlement adjudged against him by that court, which made him a debtor in the sum of \$10,940.12. On appeal to the circuit court, the balance against him was reduced to \$5,291.73, from which action of the court the heirs have appealed.

It appears from the evidence that Columbus E. Cruce died testate in December, 1860, designating in his will J. M. Cruce, his brother, as executor of his estate. The testator left two children of tender years, who have since grown up and are the appellants in this case. Agnes became twenty-one in 1874, and Julius in 1878. His will provided that the whole of his property, real and personal, should remain under the control and management of the executor as completely as it was under his own, until his children became of age. He was vested with full power to sell or dispose of any of the property, as he might deem best for the interest of the devisees, who were the two children. He was specially requested to take control and attend to the raising and education of the children.

Shortly after the executor took charge of the property, the war broke out, and he felt compelled to leave his home in Henry county and go to St. Louis. Owing to the disturbed condition of the country, he made no collections until the troubles abated. The courts in Henry county were suspended until 1864. His first annual settlement was made on the 8th of June, 1864. He made six settlements at irregular intervals, and exhibited his seventh and final settlement on the 21st of May, 1878, which, after exceptions and findings by the court, was settled in due form



on the 20th of February, 1879, after the heirs had attained their majority. Upon appeal to the circuit court, another settlement was adjudged as his final settlement, which found a balance in his hands of \$5,291.73. This was entered at the April adjourned term, 1879, and is the one appealed from by the heirs. They except to the settlement for two reasons; 1st, that the executor ought to have been charged with compound interest; 2nd, that he should have been charged with \$4,100, instead of \$3,200 on account of a sale of certain real estate to Mr. Ming, the purchaser. In the settlement appealed from, the executor had been charged with ten per cent interest, which was calculated upon each receipt and disbursement from the date thereof till the settlement in June, 1879. The evidence tended to show that the executor had never kept the funds of the estate separate from his own, and that he had not kept, during all the time, books of account showing the items of disbursement. It, also, tended to show that he had used the funds of the estate in his private business. There was no evidence of any profits made by him or of any loans of the funds at any rate of interest. He received the children of testator into his own family and supported and schooled them. In his settlements he takes credit for annual allowances towards their education and maintenance, most of which were approved and passed by the court. His duty in this respect may have been exemplary and considerate enough, but it has not been successful in eliciting any approbation or encomiums from the beneficiaries. In her testimony Agnes says: "Julius was three or four years old when we went to executor's. We lived there during the war. Never had any spending money, and went barefooted. Had no attention whatever. Went to school a little. I was sent off to Farmer City about the time the land was sold. I have asked uncle Marshall to make an allowance for me, but he would not do it. He said he had eight or nine thousand dollars of ours, and wanted to give me his note for that amount."

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It appears from the evidence that money could have been loaned readily at ten per cent per annum in Henry county since the war. In 1864, the executor sold the home place, consisting of 848 acres, for \$4,242.50. In 1867, he sold 640 acres to one Ming. In the deed of the latter sale, the consideration, as expressed, was \$4,100. In his first settlement it was reported at \$3,200. This land may, and it may not, have been sold on its own merits. It appears that it was not sold for money, but that it was, along with 910 acres of his own land, sold for a stock of goods invoiced at between eleven and twelve thousand dollars. The purchaser did not want the 910 acres belonging to the executor, without the 640 acres belonging to the estate. How much the land of the estate contributed to the sale of the land of the executor, does not appear. The evidence, however, tends to show that the land was taken in the trade at \$5 per acre, and that the market value of it at that time did not exceed that price. The court declined to hold him responsible for more than this price, and although the transaction has its unpleasant features, I do not feel called upon to disturb the ruling upon the evidence in the record.

The position taken by appellants, that the executor ought to be held responsible as a guardian or curator in this proceeding, cannot be maintained. His responsibility commenced as an executor, and it must necessarily continue until his final settlement and discharge as such. He received the assets in that capacity, and in submitting his annual and final settlements, he must be regarded as accounting for them in the same capacity. Nothing has happened to change his liability or terminate his authority as executor.

The question of exacting compound interest from him, as a delinquent executor, is both serious and important. Our statutes declare that "the court shall \* \* exercise an equitable control in making executors and administrators account for interest received by them on debts due the estate, and for interest accruing on money belonging to the estate, loaned or otherwise employed by them."

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R. S. 1879, § 232. Under the authority of this section our probate courts would seem to be possessed with the power of courts of equity on the subject of interest. And inasmuch as executors and administrators are regarded as trustees in equity, it is natural that they should follow the practice which prevails in equity in charging trustees with interest. Unfortunately the practice prevailing there is by no means uniform. There never was an absolute rule governing the rate of interest, or the liability to pay compound interest. *Barney v. Saunders*, 16 How. 542; *Fox v. Wilcocks*, 1 Binney 194; *Hook v. Payne*, 14 Wall. 252. Interest was allowed at common law only on mercantile securities, or when it was expressly promised, or was implied from the usages of trade or other circumstances. *Foster v. Weston*, 4 M. & P. 589; 6 Bing. 709. In modern times the rate is fixed by law in the absence of express contract, and no circumstances of default, however aggravated they may be, will justify a change of the rate so fixed. In some states this rule has been applied in equity, and no accounting trustee can be held for more than the statutory rates in the absence of express contract. *Norris' Appeal*, 71 Pa. St. 106; *Bond v. Lockwood*, 33 Ill. 212. In most of the states the English doctrine of exacting interest from trustees has been recognized. But as the doctrine in England is without any absolute rule, the exaction of interest here, as there, presents no settled uniformity of practice. It has been said that compound interest should be exacted by way of punishment for breach of trust. *McKnight v. Walsh*, 23 N. J. Eq. 136.

But, considerations of this character are, in my judgment, out of place in a court of equity, and they are not generally approved at the present day. 1 Perry on Trusts, 471; *Att'y Gen'l v. Alford*, 4 D. G. M. & G. 843. In *Hollister v. Barkley*, 11 N. H. 511, Chief Justice Parker remarks: "Such interest is allowed in equity as is just and reasonable. New York Ch. Rules 79. And it is just and reasonable to allow interest on all sums which are due and

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payable, or from the time when there should be a rest in the accounts. Annual rests may be allowed and interest cast on those rests." I think it may safely be said, that there are a few underlying principles, with which all orders of accounting should conform as near as the circumstances of each case will permit. 1st, A trustee is accountable for all interest or profits actually received by him from the trust fund, whether used in his private business or otherwise employed by him. Under no circumstances will he be permitted to retain any benefit or advantage from the trust fund, except his compensation or commissions. 2nd, He is, at all events, accountable for such interest or profits as he might have obtained by the exercise of reasonable skill and exertion in the management of the fund, whenever the character of his trust or the relation which he holds to the fund, requires him to make it productive. In all such cases he is, at least, accountable for such gains and profits, although the actual gains and profits may be less.

All orders for periodical rests and for compounding interest should be adopted, not for punishing the delinquent trustee, but for the purpose of attaining the actual or presumed gains, and to make certain that nothing of profit or advantage remains to the trustee, except, perhaps, his commissions or compensation. *Voorhees v. Stoothoff*, 6 Halsted 145; *Schieffelin v. Stewart*, 1 Johns. Ch. 620; *Jones v. Foxall*, 15 Beav. 388; *Dixon v. Storm*, 5 Redfield, (N. Y.) 419; *Pomeroy v. Benton*, 77 Mo. 64; *Ringgold v. Ringgold*, 1 Harris & Gill, 11; *Utica Ins. Co. v. Lynch*, 11 Paige 521; *Kyle v. Barnett*, 17 Ala. 306; *Johnson v. Miller*, 33 Miss. 553; *Hough v. Harvey*, 71 Ill. 72; *Att'y Gen'l v. Alford*, 4 De G. Mac. & G. 843; *William v. Powell*, 15 Beav. 461. It is often asserted that a special case must be made out to justify the exaction of compound interest, such as willful violation of duty or gross delinquency. *Clarkson v. De Peyster*, 1 Hopk. Ch. (N. Y.) 424; *Armstrong v. Campbell*, 3 Yerg. 201; *Hook v. Payne*, 14 Wall. 252; *Barney v. Sanders*, 16 How. 542. This is undoubtedly

true, but I think it will be found on examination of the cases that, at least, in most of them, the special circumstances were such as disclosed the actual gains to have been equivalent to such a computation, or the conduct of the trustee in withholding or destroying evidence of his gains, has left the court at liberty to presume they are fairly represented by such a computation. The burden of accounting for the actual gains and profits rests upon the trustee. Perry on Trusts, § 471; *Jones v. Foxall*, 15 Beav. 388. If he fails or refuses to furnish evidence of them, he invites the rule which shall most nearly approximate his actual gains, and leave no advantage or benefit to him by reason of his silence or refusal. Where, notwithstanding his failure to disclose his profits, they are in fact known to the court by means of other evidence before it, I conceive that the order of accounting should be framed with reference to approximating such gains, unless they should be less than a prudent management of the fund should have produced.

Where a trustee uses in his private business the trust fund, he is, *prima facie* liable, at least, for the legal rate of interest for the use of money. *Jones v. Foxall*, 15 Beav. 388. *Rocke v. Hart*, 11 Vesey 58; *Newton v. Bennet*, 1 Bro. Ch. side p. 362; *Williams v. Powell*, 15 Beav. 461. By legal rate, I allude to that rate which the law attributes to contracts, in the absence of stipulation upon the subject. Where it appears in proof that a higher rate could easily be obtained, the trustee should be accountable for such higher rate, always, of course, within the rates permitted by law. *Frost v. Winston*, 32 Mo. 489. A simple use of the funds by the trustee in his trade or business has not been viewed in the same light by all courts considering the matter. By some it has not been regarded as such gross delinquency as to justify more than simple interest, especially in absence of profits indicating a greater gain. *Rocke v. Hart*, 11 Ves. 58; *Newton v. Bennet*, 1 Bro. Ch. side p. 362; *Kyle v. Barnett*, 17 Ala. 306; *Johnson v. Miller*, 33 Miss. 553; while by others it has been denounced as



gross delinquency and willful violation of duty, justifying the charge of compound interest. *Burwick v. Halsey*, 4 Redf. 18; *Ackerman v. Emott*, 4 Barb. 626; *Dixon v. Storm*, 5 Redf. N. Y. 419; *Lansing v. Lansing*, 45 Barb. 182; *Lansing v. Lansing*, 31 How. Pr. 55.

The rule of exacting interest from delinquent trustees has, nowhere, been enforced more rigorously than in our own State. *In re Davis*, 62 Mo. 451; *Williams v. Petticrew*, 62 Mo. 460; *Frost v. Winston*, 32 Mo. 489; *Scott v. Crews*, 72 Mo. 261; *In re Camp*, 6 Mo. App. 560; *In re Camp*, 74 Mo. 192; *Pomeroy v. Benton*, 77 Mo. 64. From these cases it appears that compound interest has been exacted from defaulting trustees at the various rates of six, eight and ten per cent, according to the facts and circumstances of each case. In *Williams v. Petticrew*, *supra*, the administrator was charged with compound interest at the rate of ten per cent on the unreported funds used by him in his business. On all other funds, he was charged only simple interest. In *Scott v. Crews*, *supra*, an administrator whose letters had been revoked was charged at the rate of ten per cent. Only three rests were made in an account extending through fifteen years. In *Pomeroy v. Benton*, *supra*, an accounting partner was charged with compound interest at the rate of six per cent. But it appears from the decision that he had destroyed the book containing the transactions in which he had used the partnership funds, and had refused to give information of the profits made by him, thereby inviting the presumption which would hold him liable for the highest gains. In applying the principles underlying the subject of inquiry to the facts appearing in evidence, it will be necessary for us to consider the duties imposed upon the appellee as executor under the will of the testator, in respect to the estate committed to his charge. I do not feel called upon to pass upon the propriety of keeping this estate open so long. It is sufficient for the purposes of this accounting, that it was, in fact, kept open in obedience to the request of the testator as expressed in his will, which

contemplated that it should remain in the hands of the executor till the distributees attained their majority. Perhaps, the request of the testator could have been substantially fulfilled by closing the administration of the estate before that time, and passing the funds to the appellee in the capacity of guardian or trustee for the children. But measuring his liability by the relation of executor under which he assumed to act, it appears from the will that he was invested with ample powers of controlling and disposing of the estate so as to make it productive. And he well knew that it would, in all probability, remain in his hands until they attained their majority, unless he should sooner move for a final settlement and delivery to him as guardian or trustee.

His manifest duty was to place the funds at the highest rate of interest consistent with good security, so as to afford an income for the support of the beneficiaries without exhausting the principal. The law required him to make annual settlements and to include the interest in them as available assets of the estate. R. S. 1879, §§ 222, 231, 232. The devisees are entitled, as against the executor, to all the interest or gains actually received by him; or, at least, to such interest or gains as he should have obtained by a prudent and lawful management of the estate. It appears in evidence that money could be loaned readily at ten per cent interest, during all the time of his administration, except, perhaps, while the war was in progress. Instead of loaning the money on good security, he seems to have retained it under circumstances, which leave no doubt that it was used in his business, or converted to his use at pleasure. He fails to disclose the profits and gains made by him with it, and upon this showing the beneficiaries are entitled to the rate at which it could have been loaned. The court was right in holding him responsible for interest at the rate of ten per cent per annum.

It may be, that there are authorities to sustain the exaction of the compound interest called for by appellants,

and if the court had ordered such an account at the low rate of six per cent, I would have been inclined to pass it, under the evidence in the case pointing to the probable or presumed gains of the executor. But, as every case must be determined according to the facts and circumstances peculiar to it, I am satisfied that it would be inequitable to order interest compounded at the high rate of ten per cent per annum against the respondent. My reasons for this conclusion are as follows: First, the account extends through fifteen years. The result of the computation, like all such arithmetical results, would be surprising and excessive. It would in my judgment exceed what could be expected from any prudent and careful administration of the estate under ordinary circumstances. I think it would be a marvelous achievement for any trustee of ordinary skill and prudence to keep a fund of five or six thousand dollars so constantly and securely invested for a period of fifteen years, as to produce the net result of compound interest at ten per cent per annum. In the ordinary course of events, there would necessarily be intervals of irregular length between investments, not to say anything of possible loss and depreciation of security.

The ability of investing the interest annually as soon as collected, may well be doubted when we consider its moderate volume and the frequency with which it would have to be put out. The exaction of compound interest at such a high rate, for so long a period of time, would, in my judgment, be a departure from the leading principle which requires the chancellor to approximate as nearly as possible the actual or presumed gains and profits of the fund. Second, our statutes provide that when the executors and administrators "lend the money of the deceased or use it for their own private purposes, they shall pay interest thereon to the estate." R. S. 1879, § 231. It is to be observed that the rate of interest is not fixed; neither does the provision impose compound interest, either as a penalty for using the money or as the absolute measure of damages for

undisclosed profits. The rate of interest and the method of computing it are left subject to the equitable control of the court.

Now, in all his settlements the executor charged himself with interest, so that it can hardly be said he was concealing the fact of his use of the funds, or was acting in bad faith. The form and amount of these charges, as they appear in his settlements, indicate quite clearly that they were for his use of the fund, and the court must have so understood them. After thus approving his charges for use of the funds at simple interest during the whole period of his administration, it would hardly seem just, at the end of it, to impose upon him compound interest for the same thing.

While I am satisfied that the court was right in refusing to exact compound interest, I am not satisfied with the method adopted by the court for computing and applying the simple interest which the court adjudged. It appears that interest was calculated on the receipts and disbursements respectively, for the whole period of the administration, at the end of which the sum total of disbursements with interest was subtracted from the sum total of receipts with interest, upon which result judgment was entered.

The method of computing and applying interest in trustees' accounts, is only a means to an end, like the rate of interest adopted or the propriety of compounding it. No invariable method prevails as at law. *Riney v. Hill*, 14 Mo. 500. The beneficiaries are entitled to such method of calculation as shall most closely approximate the amount which would probably have resulted from a fulfillment of the obvious duties of the trust. Knowing, as the executor did, that the beneficiaries were dependent upon the fund or estate for their support, it was his duty to collect and appropriate the annual interest accruing on the fund to a discharge of the current disbursements made by him on account of the estate. The interest should be so computed and applied as to effect this object as nearly as it can be conveniently done. There are several methods of comput-

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ing interest. The one adopted by the court is usually termed the mercantile method. Periodical rests and interest on balances are sometimes united with this method, *Hollister v. Barkley*, 11 N. H. 511; *Averill Coal & Oil Co. v. Verner*, 22 Ohio St. 372; *Brooks v. Robinson*, 54 Miss. 272; *Burwell v. Anderson*, 3 Leigh 359; *Granberry v. Granberry*, 1 Wash. (Va.) 246; *Massey v. Massey*, 2 Hill Ch. 492; *State v. Layton*, 3 Harr. 469; *Langdon v. Castleton*, 30 Vt. 295; 1 Am. Leading Cases 638. Periodical rests do not necessarily imply compound interest. The interest may be applied at the end of each year, or carried forward in an interest account. But in the absence of an order for such application, a decree to take an account with annual rests would imply and carry compound interest against the accounting party, if the balance was against him. The mercantile method, without rests or application of interest to current disbursements, is unsuited to a long account by a trustee extending through many years. The injurious effect of it is not felt in a short account of two or three years. As an instance of its working in a long account, I will call attention to the item of \$60 for the taxes of 1866, as entered in the present account. The interest allowed to the executor on this disbursement amounts to \$76.33, covering a period of twelve years and seven months, while it is apparent that at the time it was made, the executor had in his hands sufficient interest to pay it, and thus cut off the subsequent interest it is permitted to bear.

It is claimed by counsel that the method employed in this case was approved in *Stoong v. Wilkson*, 14 Mo. 116. The account in that case ran through only three or four years. It was passed by the court without comment. But in the case of *Frost v. Winston*, 32 Mo. 489, the same method was expressly disapproved. No particular method can be said to prevail in this state in respect to accounting in equity. The courts should in each case adopt the method best suited to the duties of the trust and the nature of the accounts. The method suggested by appellants of com-



pounding interest on each item of debit and credit is clearly erroneous. If the balance at any time should prove to be in favor of the executor, he would be receiving compound interest from the estate for his advances. The account in this case ought to be computed in such way as to appropriate the annual interest to the discharge of current disbursements, but not so as to admit of interest being computed upon interest. As already intimated, it may be necessary in some cases to compute interest upon interest in order to approximate the actual or presumed gains of the accounting party. But such is not the case before us. The rule in *Riney v. Hill*, 14 Mo. 500, for computing interest on legal demands, upon which partial payments have been made, is unsuited to trustees' accounts, in which the principle fund is being constantly increased by additional receipts and constantly diminished by repeated disbursements. I am not aware that it has ever been applied to such accounts.

The method employed in *De Peyster v. Clarkson*, 2 Wend. 78, which was approved by Chancellor Kent, seems to meet the requirements of this case. Accordingly the judgment is reversed, and the cause remanded, with directions to calculate interest upon the accounts approved in the record, in conformity with the following rule and to enter judgment accordingly:

1st. To the available funds on hand June 8th, 1864, said to be \$3,886.15, add the receipts of the year from June 8th, 1864, to June 8th, 1865. Next add together the disbursements during the same period and subtract the sum of them from the sum of the debits and receipts ascertained as aforesaid. The result will be the amount of principal on hand at the end of the year. Next, calculate the interest at the rate of ten per cent per annum upon the amount of available funds on hand June 8th, 1864, and on the receipts which came in during the year, from their respective dates. Next, calculate the interest at the same rate upon the disbursements during the year from their respective dates. Then subtract the sum of interest on the

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disbursements from the sum of interest on debits and receipts. The result will be the sum of interest on hand at the end of the year, which is to be applied to the discharge of disbursements of the second and subsequent years.

2nd. In like manner add together the principal on hand at the beginning of the second year and the receipts of that year: Next subtract from this amount the sum of the disbursements of the second year, which remain undischarged if any, by application of the interest on hand at the beginning of the year. The result will be the amount of principal on hand at the end of the second year. Next calculate the interest as before on the principal first aforesaid, and on the receipts of the second year from their respective dates, for that year. Then calculate interest on so much of the disbursements of the second year as shall remain undischarged by application of interest on hand at the beginning of the year. Then subtract the sum of interest on the disbursements so ascertained from the sum of interest on the principal and receipts so ascertained. The result will be the amount of interest on hand at the end of the second year, which is not to be added to the principal of that year, but is to be carried on for the purpose of discharging subsequent disbursements. If a surplus of interest should remain after the payment of all subsequent disbursements with it, it is to be added to the principal only at the end of the account. In no event is it to bear interest

3rd. So continue the calculation for each year until the date of the final settlement June 8th, 1879. If the balance of interest for any year should be in favor of the executor, it will be applied to a reduction of the debits chargeable against him in the succeeding year. When the balance of the whole account has been ascertained at the end thereof, then calculate simple interest on said balance at the rate of six per cent per annum up to the date of judgment.

EWING, C., concurs; PHILIPS, C., not sitting, having been of counsel before submission.

# INDEX.

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## ACCOUNTING.

SEE TRUSTS AND TRUSTEES.

## ADMINISTRATION.

1. ADMINISTRATION: JUDGMENT DEMANDS. A creditor possessed of a judgment lien against the real estate of a deceased debtor, is entitled as against the administrator selling said real estate under order of the probate court, to have his judgment lien first satisfied from the proceeds of the sale, leaving the surplus only for distribution among the unsecured creditors. If, after knowledge of such lien, evidenced by a recital of it in his petition for sale of the real estate, the administrator has paid out to unsecured creditors any of the proceeds of such sale, in violation of the lien, such fact is no answer to an application for its payment. *Bassett v. Slater*, 75.
2. ADMINISTRATORS, JUDGMENT AGAINST. The judgment in an action against an administrator, should not be against him personally, but against him in his representative capacity. *Blondeau v. Sheridan*, 545.
3. ADMINISTRATION: DEMANDS: DISTRIBUTION. On an application by a creditor of an estate for an order on the administrator to pay his demand, which has been duly exhibited and allowed, the answer of the administrator that he has paid over the funds of the estate to the distributees, and for that reason has no funds on hand, constitutes no valid defense to the application. *North v. Priest*, 561.
4. ———: ANNUAL SETTLEMENTS, FORCE OF. Annual settlements are only interlocutory steps in the proceeding *in rem*, which terminates in the final settlement and order of discharge. They have not the effect of judgments, no appeal can be taken from an order approving them, they may all be reviewed at the final settlement, and proceedings to falsify and surcharge the final settlement, need not ask to have them set aside, but when the final settlement is opened, they are all open for examination and correction. *Ib.*
5. ———: ———: EXCEPTIONS: EVIDENCE. It is not necessary during the administration that formal exceptions should be filed to annul

settlements, in order to contradict their import in any proceeding in which they are submitted as evidence. When invoked against the administrator, he is entitled to any evidence they may contain in his favor, but they are conclusive neither for nor against him. *Ib.*

6. ———: SALE OF LAND FOR DEBTS: EQUITY. Equity will not permit heirs to hold possession of real estate together, with its increased value caused by improvements and expenditures made thereon in good faith by the administrators, and at the same time to resist the application of creditors to subject said property to the payment of their debts, on the technical ground that the improvements and expenditures constitute waste, for which the creditors should resort to a suit on the administrators' bond, with the trouble, expense and delay incident thereto. *Van Bibber v. Julian*, 618.
7. ———: FINAL SETTLEMENT: WASTE, WHEN INCLUDED THEREIN. Waste of the estate by an administrator, occurring before final settlement, is included therein, and so long as the settlement remains in force it is conclusive on the heirs and all others. *Ib.*
8. EYECUTORS: INTEREST: STATUTE. Probate courts, under Revised Statutes 1879, section 232, possess the power of courts of equity in relation to the interest to be charged against executors and administrators in favor of the estate, and they being regarded in equity as trustees, the court will follow, as to them, the practice which prevails in equity in charging trustees with interest. *Cruce v. Cruce*, 676.

#### ADMISSIONS.

1. INSANE PERSON: INFANT: GUARDIAN AD LITEM: ADMISSIONS OF. The guardian *ad litem* of an infant can waive nothing and admit nothing against his ward, but the adversary of such infant must prove his whole case, whether it be one in equity or at law. And the same rule applies in the case of a lunatic. *Collins v. Trotter*, 275.
2. INSANE PERSON: INFANT: ADMISSIONS OF GUARDIAN. The guardian of an insane person, like the guardian *ad litem* of an infant, may raise issues by his pleadings whenever he thinks it for the benefit of his ward, but whatever points are tendered, or admissions made, for the purpose of pleading, cannot be used against the person in ward. *Ib.*
3. ADMISSIONS. Admissions in an agreed statement of facts, to have that effect, should be expressed in terms and not by indirection. *Robidoux v. Casseleggi*, 459.

#### ADVERSE POSSESSION.

1. EJECTMENT: TITLE: LIMITATION. One who shows no color or claim of title to land, in order to acquire title thereto by adverse possession and limitation, must show by a preponderance of testimony and to the satisfaction of the court or jury, that he and those under whom he claims, have had the actual, continuous, uninterrupted

and adverse possession of the same for not less than ten years before commencement of suit for recovery of its possession. *Huckshorn v. Hartwig*, 648.

2. ———: ———: ———. Where one, and those under whom he claims, entered upon and occupied land by mistake as to the true boundary line between such land and an adjoining tract, but only intending to claim to the line, as it might be subsequently ascertained, then such possession is not adverse to the true owner, and a title by limitation cannot be acquired thereby. *Ib.*
3. ———: ———: ———. Where defendant, within ten years before the commencement of suit, and before he had had ten years' possession of land, stated to plaintiff that he only claimed to the true line between their lands, and would be governed by the survey whenever a correct line was made, then his possession of the tract in dispute from that date would not be adverse to plaintiff, if on a correct survey it should be found to be part of the tract described by its numbers in plaintiff's petition, although defendant may have stated at the time that he claimed the line to which he then held to be the true one. *Ib.*

# ALIBI.

SEE CRIMINAL LAW, 12.

# ALTERATION.

SEE DEEDS, 6, 7.

# AMENDMENT.

SEE PLEADING, 1.

# APPEAL.

1. APPEAL, SUFFICIENCY OF BOND: An appeal bond, on appeal from a justice of the peace, which recites that the appellant shall personally appear at the circuit court on the first day of the next term, then and there to answer the charge against him, and shall pay and satisfy the said judgment, and all costs which have accrued or may accrue on said appeal, and otherwise abide the judgment of said court, and not depart the court without leave, substantially complies with the requirements of the statute. R. S. 1879, § 2058. *The State v. Thompson*, 163.
2. APPEAL: DISMISSAL: NEW BOND. Where a party on appeal from a justice, submits himself to the jurisdiction of the circuit court, although upon an irregular bond, and, before dismissal, tenders an unobjectionable bond, he should be allowed, under the statute, (R. S. 1879, §§ 2077, 3053,) to give it, rather than to have his appeal dismissed. *Ib.*



3. ———: ———: COSTS. Where the appellant's appeal is dismissed for want of jurisdiction, the court, nevertheless, has authority to render judgment against him for costs improvidently incurred therein. *Ib.*

SEE JUSTICES' COURTS, 1.

#### ARGUMENT.

SEE PRACTICE, CRIMINAL, 11.

#### ATTACHMENT.

1. AFFIDAVIT FOR ATTACHMENT, SUFFICIENCY OF. An affidavit for attachment not made by the plaintiff himself, and not stating on its face that it was made for him, is, nevertheless, sufficient if it was made by the person who signed the petition as plaintiff's attorney; and such affidavit need not disclose the attorney's means of knowledge. Affirming *Gilkeson v. Knight*, 71 Mo. 403. *Johnson v. Gilkeson*, 55.
2. WRIT OF ATTACHMENT, RETURN THERETO. The indorsement of the return of the sheriff upon the petition annexed to a writ of attachment, instead of upon the writ itself, is only an irregularity in form, and will not avoid the jurisdiction of the court in proceeding to judgment. *Ib.*
3. ———: PRESUMPTION. Where the return recites an attachment of land in a county named, giving its location, it will be presumed that the attachment was made in the county where the land is situated. *Ib.*
4. ATTACHMENT, VALIDITY OF; JURISDICTION. Where the validity of an attachment rests upon an affidavit of non-residence and levy of the writ of attachment, return as to the person of the defendant is not necessary to give jurisdiction as to the property attached. *Ib.*

#### BAILOR AND BAILEE.

BAILOR AND BAILEE: ESTOPPEL. It is a general rule that a bailee of property cannot dispute the title of his bailor, and where defendant borrowed a pair of mules of plaintiff, and at the time made no mention of any claim to them by himself or wife, he will be estopped to claim them against plaintiff, on the ground that they were the joint property of plaintiff and defendant's wife, and that he was holding them with and for his wife. *Pulliam v. Burlingame*, 111,

#### BANKRUPTCY PROCEEDINGS.

SEE PRINCIPAL AND SURETY, 3.

## BILL OF EXCEPTIONS.

SEE PRACTICE IN SUPREME COURT, 10.

PRACTICE, CRIMINAL, 10.

## BOND.

**BOND, RECOVERY ON: AMOUNT.** In suits on penal bonds with collateral conditions, no recovery can be had in excess of the penalty of the bond. *Showles v. Freeman*, 540.

SEE LAND AND LAND TITLES, 1.

## BURDEN OF PROOF.

SEE CRIMINAL LAW, 12.

INSANE PERSONS, 4.

NEGLIGENCE, 2.

## CARRIERS.

1. **CARRIER OF PASSENGERS: INJURY TO PASSENGER: CONNECTION BETWEEN INJURY AND MISCONDUCT OF CARRIER: PROOF OF.** In an action for damages against a street railway by a passenger, for an injury received in consequence of a sudden jerk of the car, it is not incumbent on the plaintiff to show affirmatively the immediate connection between the injury and the misconduct of the carrier, it appearing that the car was under the control of the carrier, or its servant, and that the accident was such as, under the ordinary course of things, would not have occurred had those who had the management of the car used proper care. *Dougherty v. The Missouri Railroad Company*, 325.
2. **CARE REQUIRED OF CARRIER OF PASSENGERS.** While such carrier of passengers is not an insurer of their safety, it is bound to use due care and vigilance, so as to safely transport them. It must allow reasonable time for them to enter and leave its vehicle with safety, in the exercise of ordinary care, and should, also, allow reasonable time for passengers to enter and take seats, if there be any, or reasonable time for them to seize the straps furnished for passengers when standing, and while it may start before a passenger has had time to take his seat, or to secure his hold on the strap, it must exercise the utmost care when thus starting, so as not to jar or upset him. *Ib.*
3. **CARRIER OF PASSENGERS: CARE AND NEGLIGENCE.** Care and negligence are relative terms, and the degree of caution required of carrier and passenger, is to be estimated, in a measure, by the hazard to life and limb; it is always such care and vigilance as a prudent, rational person would exercise under like circumstances. *Ib.*

## CONDEMNATION PROCEEDINGS.

1. CONDEMNATION PROCEEDINGS: ESTOPPEL. Where the owner of land appeared by agent before commissioners, appointed in proceedings under the statute, (Gen. St. 1865, p. 352, §§ 1, 2, 3,) to condemn such land for a right of way for a railroad, and endeavored to increase the amount of their finding, and appeared in court by attorney and objected to the award because it was insufficient, but made no objection to the construction of the road, and took no legal steps to prevent its construction, he cannot maintain an action of ejectment against the railroad company to recover possession of the land. *Gray v. The St. Louis & San Francisco Railway Company*, 128.
2. CONDEMNATION PROCEEDINGS: POWERS OF JUDGE OR COURT. Proceedings to condemn land for a right of way for a railroad, are purely statutory, and the powers possessed by the judge at chambers or by the court in appointing commissioners, reviewing and setting aside their report and appointing new commissioners, are limited and prescribed by statute, and can only be exercised in the manner provided by the legislature. *Ib.*
3. ———: VESTED RIGHTS. When commissioners have been appointed, have made their report and their award has been paid to the clerk, for the owner of the land as provided by statute, (Gen. St. 1865, p. 352, § 3,) the company is vested with the interest in the land for the purposes appropriated, and mutual rights are created which cannot be divested, except by consent of both parties, unless the company, as provided by statute, shall elect to abandon the proposed appropriation of the land. *Ib.*
4. ———: ———. Plaintiff's land having been condemned upon proceedings at the instance of one company, the money paid to the clerk, the land reduced to possession, the road constructed and put in operation, and sold to defendant company, such first company cannot afterward, by motion, dismiss the proceedings as to plaintiff, such action being an interference with vested rights. *Ib.*
5. ———: FOREIGN ROAD. A railroad company incorporated and existing under the laws of an adjoining state, is empowered by statute, (R. S. 1879, § 790; Laws 1870, p. 90, § 2,) to obtain, in this State, a right of way by condemnation proceedings. *Ib.*

## CONSTITUTIONAL LAW.

1. LAWS, EX POST FACTO, RETROSPECTIVE, CONSTITUTIONAL. Revised Statutes 1879, section 1655, authorizing the conviction of a defendant "of any offense, the commission of which is necessarily included in that charged," is not an *ex post facto* law, or retrospective in its operation, (Const. 1875, art. 2, § 15,) when applied to a case in which the offense was committed and the indictment found prior to the taking effect of said section and the trial had thereafter, notwithstanding such conviction was not authorized by the law in force at the time the offense was committed and indictment found. 2 Wag. Stat., § 1, p. 852. *The State v. Johnson*, 60.

2. **CONSTITUTIONAL LAW: TITLE OF BILL.** The definition of crimes and the procedure against persons accused of committing them, may very properly be embraced in one bill. Chapter 24 of the Revised Statutes 1879, contains no incongruous matters, and its title of "Crimes and Criminal Procedure" clearly indicates what it contains. It is not obnoxious to the constitutional provision, (Const. 1875, art. 4, § 28,) that the subject of each bill shall be clearly expressed in its title, and that no bill shall contain more than one subject. *The State v. Brassfield*, 151.
3. **CRIMINAL LAWS: CONSTITUTION: MARRIAGE.** The sections of the statute, (R. S., §§ 1546, 3270,) making it a misdemeanor for any one having authority to join others in marriage, to willfully fail to make return of any marriage solemnized by him to the recorder of the proper county, is not unconstitutional. *The State v. Madden*, 421.
4. **CONSTITUTION OF THE UNITED STATES: EQUAL PROTECTION OF THE LAWS.** A law authorizing changes of venue generally throughout the State, but exempting the city of St. Louis from its benefits, would be repugnant to section 1 of the fourteenth amendment to the constitution of the United States, which forbids a state to deny to any person the equal protection of the laws, and the result would be the same, whether such law be passed in the first instance, or whether the deprivation of the same right elsewhere enjoyed and recognized is occasioned by subsequent legislation. *The State v. Hayes*, 574.

SEE CRIMINAL COSTS, 1.

CRIMINAL LAW, 13,

ELECTIONS, 1.

CONTINUANCE.

SEE CRIMINAL LAW, 13.

PRACTICE, CRIMINAL, 7.

CONTRACTS.

1. **CONTRACT: CONSTRUCTION: CUSTOM.** Where contractors undertook to do the masonry of a building according to plans and specifications for the same, for the sum of \$2 in addition to the price of rock per perch, and the evidence showed a custom prevailing, in ascertaining how much masonry had been completed so as to pay the demand of a mason for laying rock in a wall, to count corners twice, each corner constituting a part of two intersecting walls, also all openings for doors and windows as if they were solid matter; *Held*, the contractors were entitled, under their contract, to a measurement in accordance with said custom. *Fitzsimmons v. The Academy of Christian Brothers*, 37.

2. ———: AGENT: NOTICE. Where it is sought to hold a party liable for services which were not performed by previous request, and which might properly have been provided and paid for by another, it ought to be made to appear that he permitted the services to be rendered without objection, knowing that they were procured to be rendered by one acting as his agent, or having good reason to believe that the person rendering them relied upon him for compensation. *Holmes v. The Board of Trade of Kansas City*, 137.
3. POST-NUPTIAL AGREEMENT, WHEN DOWER BARRED BY. Post-nuptial agreements for separation, and for the separate maintenance of the wife, through the intervention of a trustee, are valid, and, where accepted by the wife in lieu of dower, will be held to bar her dower right. *Garbut v. Bowling*, 214.
4. CONTRACT: EVIDENCE. That a contract was to be subsequently reduced to writing, is not proof that there was no final agreement between the parties. *Methudy v. Ross*, 481.
5. ———: ———: PRESUMPTION. When the agreement was to be reduced to writing, and there is no sufficient evidence from which its exact terms can be determined, it will be inferred that the understanding of the parties was, that there was no contract until the terms were reduced to writing. *Ib.*
6. CONTRACT: ASSENT OF PARTIES. There can be no contract without the assent of the parties thereto, but this assent may be indicated in various ways, and courts cannot say what facts, or words or acts indicate the agreement between the parties. Each case must be governed by its own facts, and it is error to instruct the jury that silence at the time does not constitute assent, unless there was some overt act of acquiescence after the thing proposed had been done. *Botkin v. McIntyre*, 557.
7. CONTRACT, PART PAROL: EVIDENCE. When part only of an entire contract is reduced to writing, the remainder may be proved by parol, yet the latter must be consistent with and not contradictory of the written part. *Gardner v. Mathews*, 627.

SEE CORPORATIONS, 1, 2, 3.

LEASE, 1, 2, 4.

PARTNERSHIP, 1.

PROMISSORY NOTES, 3.

WAREHOUSE.

#### CONTRIBUTORY NEGLIGENCE.

SEE NEGLIGENCE.



## CONVEYANCES.

CONVEYANCE: MISDESCRIPTION: EQUITY: NOTICE: POSSESSION. *Davis v. Briscoe*, 27.

SEE HOMESTEADS AND EXEMPTIONS, 1.

## CONVERSION.

SEE FRAUD, 1.

INDEMNIFYING BOND, 1, 2.

## CORPORATIONS.

1. CORPORATION, CONTRACTS OF: ULTRA VIRES. The question of *ultra vires* as affecting the validity of contracts of a corporation, can be raised only by a direct proceeding by the State against the corporation, and not in a collateral proceeding by an individual, except when the charter of the corporation not only specifies and therefor limits it to the business in which it may engage, but, by express terms, or a fair implication therefrom, invalidates transactions outside of its legitimate corporate business. *St. Louis Drug Company v. Robinson*, 18.
2. CORPORATION: CONTRACT OF SERVICE. No formal resolution of the board of directors of a corporation is prerequisite to the employment of counsel, and a contract for legal service may be made by the tacit or implied consent of the board of directors. A director, with the knowledge of the board, and independently of his duties as director, may act as the agent of the corporation, and it will be bound by his acts. *Holmes v. The Board of Trade of Kansas City*, 137.
3. ———: ———: AGENT: RATIFICATION. Where a person is employed for a corporation, by one assuming to act in its behalf, and renders service according to agreement, with the knowledge of its officers and without notice that the contract is not recognized, as valid and binding, such corporation will be held to have sanctioned and ratified the contract, and be compelled to pay for the service. *Id.*

SEE INSURANCE.

## COUNSEL.

SEE PRACTICE, CRIMINAL, 11.

## COUNTY COURT.

CITY TAXES: COMPROMISE OF: COUNTY COURT NO AUTHORITY TO. A county

court has no authority to compromise city taxes, and where a city is forbidden by its charter to so compromise, it cannot ratify an unauthorized compromise made by the county court. *The City of Kansas v. Hannibal & St. Joseph Railroad Company*, 285.

SEE PLEADING, CRIMINAL, 2.

TAXES, 11

#### COUNTY WARRANTS.

1. COUNTY WARRANT: LIMITATION. An action on a county warrant is not barred by the statute of limitations if commenced within ten years after the cause of action accrued. *Vaileau v. Newton County*, 591.
2. ———: WHEN PAYABLE FROM GENERAL REVENUE FUND, ALTHOUGH DRAWN ON SPECIAL FUND. The payment of a county warrant can be enforced against the general revenue fund, although drawn on a special fund, if the county has used the latter for the payment of demands not properly chargeable to it, and thereby diverted it from the payment of the warrant. *Ib.*

#### COURTS.

SEE COUNTY COURT.

ST. LOUIS CRIMINAL COURT.

#### COVENANTS AGAINST INCUMBRANCES.

1. COVENANTS AGAINST INCUMBRANCES: FOUNDATION OF SUIT: RECOVERY OF TAXES. The foundation of an action for the recovery of taxes paid by the grantee under a deed containing covenants against incumbrances, is proof of such a deed, and the existence of the taxes as an incumbrance, and their payment by the grantee. Without proof of these, such suit cannot be maintained. *Patterson v. Yancy*, 379.
2. COVENANT AGAINST INCUMBRANCES, NATURE OF. A covenant against incumbrances is a covenant *in presenti*, is a mere right of action, does not run with the land, is not assignable at law and can be taken advantage of only by the covenantee or his personal representative. *Blondeau v. Sheridan*, 545.

#### COVENANTS OF SEIZIN.

COVENANT OF SEIZIN: EASEMENT. A covenant of seizin is not broken by the existence of an easement. *Blondeau v. Sheridan*, 545.

## COVENANTS OF WARRANTY.

1. COVENANTS OF WARRANTY: EVICTION. When the covenantee in a covenant of warranty of title never has had actual possession of the conveyed premises which was held adversely, and by reason of a paramount title he has never been able to obtain possession of the land, such inability to obtain possession will constitute an eviction. *Blondeau v. Sheridan*, 545.
2. ———: BREACH OF: STATUTE OF LIMITATIONS. Where there has been no decision against the paramount title, and within ten years after its extinguishment by the covenantee he brings his action on the covenant of warranty, he is not barred by the statute of limitations. *Ib.*
3. COVENANTS IN DEED: CONTEMPORANEOUS PAROL CONTRACT INADMISSIBLE TO CHANGE. One who accepts a deed to real estate, with an express covenant therein to warrant and defend the title thereto against the claim of any person whomsoever, save and except the taxes of a certain specified year, cannot afterwards claim that the covenantor, by a parol contract contemporaneous with the deed, agreed to pay the taxes so expressly excepted from the operation of said covenant. *MacLeod v. Skiles*, 595.

## CRIMINAL COSTS.

1. CRIMINAL COSTS. A county which has incurred expense in the investigation of a felony certified from another county, as provided by Revised Statutes 1879, section 1804, and in the arrest and imprisonment of the perpetrators thereof, cannot recover of the county from which the offense was certified such costs so incurred, said section 1804 having been declared unconstitutional. *Henry County v. St. Clair County*, 72.
2. APPEAL: DISMISSAL: COSTS. Where the appellant's appeal is dismissed for want of jurisdiction, the court, nevertheless, has authority to render judgment against him for costs improvidently incurred therein. *The State v. Thompson*, 163.

## CRIMINAL LAW.

1. CRIMINAL LAW: INDICTMENT. An indictment which charges an offense in the language of the statute creating it, is sufficient. *The State v. Anderson*, 78.
2. SEDUCTION: EVIDENCE OF PRIOR SPECIFIC ACTS. In a prosecution under Revised Statutes 1879, section 1259, for seducing, under promise of marriage, "any unmarried female of good repute, under twenty-one years of age," evidence of specific acts of lewdness with others than defendant, prior to the alleged promise of marriage, is inadmissible. It is the reputation and the age of the female, and not her previous conduct, that bring her within the protection of the statute. *The State v. Brassfield*, 151.

3. ———: EVIDENCE OF SUBSEQUENT ACTS OF ILLICIT INTERCOURSE. Evidence of acts of illicit intercourse on the part of the female, subsequent to the alleged seduction, is inadmissible. Such acts, so far from furnishing any defense or mitigation of the seducer's act, aggravate the offense. *Ib.*
4. ———: EVIDENCE OF ILLICIT INTERCOURSE WITH OTHERS THAN DEFENDANT. Evidence that the female alleged to have been seduced, had not had illicit intercourse with any other person than defendant, is irrelevant and immaterial, and is not a matter upon which evidence could be introduced to contradict her, and the paternity of the child is immaterial. *Ib.*
5. ———: PRIOR INTERCOURSE WITH DEFENDANT. Evidence tending to prove that the prosecuting witness and the defendant had sexual intercourse with each other prior to the date of the alleged promise of marriage, is admissible as conducing to show that the seduction was not accomplished under that promise. *Ib.*
6. ———: PROMISE OF MARRIAGE: CORROBORATION. The statute, (R. S. 1879, § 1912,) only requires that the prosecuting witness be corroborated as to the promise of marriage. The jury may find the fact of seduction upon the uncorroborated testimony of the prosecuting witness, and corroboration as to the promise is satisfied by proof of circumstances which usually attend an engagement of marriage. *Ib.*
7. ———: PROMISE, WHEN MADE. It is not necessary that the promise of marriage should either be made or formally renewed at the time of the seduction. It is only required to prove that defendant, under promise of marriage, whether made at the time or previously, accomplished the seduction, and that by reason of the engagement she consented to the illicit connection. *Ib.*
8. ———: PRIOR ACTS: REFORMATION. Although the prosecuting witness had had illicit intercourse with the defendant prior to the promise of marriage, if she had reformed and was chaste at the time of the alleged seduction, such fact constitutes no defense, if the seduction was accomplished by reason of the promise of marriage. *Ib.*
9. ———: PROSECUTION, WHEN BARRED. To sustain a conviction it is not necessary that the jury should find that the seduction was accomplished on the day alleged in the indictment, but it is sufficient if they find that it was accomplished at any time within three years next before the finding of the indictment, provided that at the time the seduction occurred there was a promise of marriage by defendant subsisting, and the seduction was accomplished by reason of such promise. *Ib.*
10. CRIMINAL LAW: INFORMATION. A criminal prosecution cannot be founded upon the affidavit of a private citizen. Such proceeding upon information must be filed by the prosecuting attorney. *The State v. Thompson*, 163.
11. ———: RECENT POSSESSION OF STOLEN PROPERTY: PRESUMPTIONS. Where property has been stolen, and recently thereafter it is found in the possession of another, such person is presumed to be

the thief, and, in the absence of other rebutting evidence, if he fail to account for his possession of such property in a manner consistent with his innocence, this presumption becomes conclusive against him. *The State v. Jennings*, 185.

12. ——— : ALIBI : BURDEN OF PROOF. Where an *alibi* is relied upon as a defense in a criminal prosecution, the burden rests upon the defendant to establish it to the satisfaction of the jury. *Ib.*
13. ——— : ABSENT WITNESS : CONTINUANCE. Where a continuance is asked by a defendant in a criminal prosecution, on account of the absence of material witnesses who had been subpoenaed, but for whom no attachment had been asked, in a case where an attachment would have been ineffectual to secure their attendance, the prosecuting attorney may prevent a continuance by admitting, as provided by statute, (R. S. 1879, § 1886,) that said witnesses, if present, would testify as stated in the application of the accused for a continuance. Such construction of the statute does not deny to the accused his constitutional right to have process to compel the attendance of witnesses in his behalf. Const. 1875, art. 2, § 22. *Ib.*
14. ——— : MANSLAUGHTER IN FOURTH DEGREE. Where a defendant, on trial for murder, testified that the deceased, after a quarrel, knocked her down and threw himself upon her, falling upon a knife in her hand, whereby he was unintentionally killed, an instruction should be given for manslaughter in the fourth degree, under the provisions of Revised Statutes 1879, § 1249. *The State v. Douglass*, 231.
15. ——— : ———. Where there is evidence to the effect that a killing was intentionally done, in the heat of passion caused by a blow, an instruction should be given for manslaughter in the fourth degree, under the provisions of Revised Statutes 1879, § 1250. *Ib.*
16. ——— : IDEM SONANS. The name "Lossene" is *idem sonans* with "Lawson." *The State v. Pullens*, 387.
17. INDICTMENT : PURPORT : TENOR. The tenor of an instrument means an exact copy of it, while the word "purport" imports what appears on the face of an instrument, and means the apparent, not the legal import. *Ib.*
18. DRAMSHOP KEEPER, WHO IS. A dramshop keeper is a person licensed by law to sell intoxicating liquors in any quantity not exceeding ten gallons. R. S. 1879, § 5435. *State v. Heckler*, 417.
19. CRIMINAL LAW : SELLING INTOXICATING LIQUOR ON SUNDAY. In a prosecution on an indictment, under Revised Statutes 1879, section 5456, for selling intoxicating liquor, as a dramshop keeper on Sunday, without proof that the person charged had a dramshop keeper's license, it is error to convict of the offense in manner and form as charged in the indictment. But, under the provisions of Revised Statute section 1655, a conviction may be had under Revised Statute section 1581, if a sale on Sunday be proved. *Ib.*



20. ———: ———: PRINCIPAL AND AGENT. A principal will be held criminally liable for a sale of intoxicating liquor by his agent, unless he shows that such sale was not authorized by him, and was forbidden. *Ib.*
21. ———: CONSTITUTION: MARRIAGE. The sections of the statute, (R. S., §§ 1546, 3270,) making it a misdemeanor for any one having authority to join others in marriage, to willfully fail to make return of any marriage solemnized by him to the recorder of the proper county, is not unconstitutional. *The State v. Madden*, 421.
22. ———: STATUTE: PLEADING: INFORMATION. Where a statute makes it a misdemeanor to exhibit in a threatening manner certain specified weapons, or "other deadly weapons," it is not intended to declare that only those named are deadly weapons, and the only distinction made is, that in a prosecution under such statute for the exhibition of those specifically named, it is not necessary to allege that they are deadly weapons, whereas for any other it must be alleged and proved that it is a deadly weapon. *State v. Sebastian*, 514.

SEE DRUGGISTS.

JUDICIAL NOTICE, 1.

PLEADING CRIMINAL.

PRACTICE CRIMINAL.

CUSTOM.

SEE CONTRACTS, 2.

DAMAGES.

DAMAGES: SUIT BY MINOR, WHEN BROUGHT. Under Revised Statutes 1879, §§ 2121, 2125, a minor at the time of his parent's death, may sue for the damages allowed by the statute after attaining his majority, provided suit be brought within one year from the time of such death. *Rutter v. The Missouri Pacific Railway Company*, 169.

SEE RAILROADS, 5, 6, 9.

REFLEVIN, 1.

DEAF MUTES.

SEE INSANE PERSONS, 4.

DECREE.

SEE PRACTICE, CIVIL, 6.

## DEEDS.

1. **TAX DEED: EVIDENCE.** A tax deed made by the county treasurer as *ex-officio* collector, is void and not admissible in evidence, in the absence of proof that the office of collector has devolved upon the treasurer by reason of the adoption of township organization by the county. *Spurlock v. Dougherty*, 171.
2. **DEEDS, CONSTRUCTION OF: POSSESSION.** The ruling of this court in *Sutton v. Casseleggi*, 77 Mo. 397, as to the legal effect of certain deeds and possession thereunder, followed and held decisive of questions raised on this appeal. *Robidoux v. Casseleggi*, 459.
3. **MUNICIPAL CORPORATION: DEED TO ON CONDITION: REVERTER.** Where a municipal corporation acquires real estate upon a condition expressed in the deed of the grantor, that within five years it shall erect thereon a certain building proper for municipal purposes, and fails to comply with said condition by not erecting the structure, it must permit the land to return to the grantor, like any other owner of land on condition. *Clark v. The Inhabitants of the Town of Brookfield*, 503.
4. **COVENANTS IN DEED: CONTEMPORANEOUS PAROL CONTRACT INADMISSIBLE TO CHANGE.** One who accepts a deed to real estate, with an express covenant therein to warrant and defend the title thereto against the claim of any person whomsoever, save and except the taxes of a certain specified year, cannot afterwards claim that the covenantor, by a parol contract contemporaneous with the deed, agreed to pay the taxes so expressly excepted from the operation of said covenant. *MacLeod v. Skiles*, 595.
5. **DEED: DESCRIPTION: EXCEPTION.** A grantor in a deed conveyed the "west half of section 15, being 320 acres," and in a subsequent clause of the same deed conveyed another tract in section 22, except ten acres, describing the land so excepted by metes and bounds, which exception, according to said metes and bounds, extended into and included a part of the west half of section 15, previously conveyed; *Held*, (1) That whether the deed passed to the grantee the entire west half of section 15 was a question of intention on the part of the grantor to be ascertained from the deed itself, and (2) That all said west half of section 15 passed to the grantee, the exception not reserving to the grantor any part of said section 15 previously conveyed. *Hampton v. Helms*, 631.
6. **DEED, ALTERATION OF.** It will be presumed, in the absence of proof to the contrary, that an apparent alteration of a deed was made before the final execution and delivery of the instrument. If there be suspicious circumstances on its face, it is for the trial judge to determine from inspection whether they be such as to require the party offering the deed to explain them. *Holton v. Kemp*, 661.
7. **DEED: ALTERATION: WHEN QUESTION SUBMITTED TO JURY.** When the trial judge submits the question of such alteration with the instrument itself, and the proof to the jury, it is a question of fact for their determination, and their finding, as on any other question of fact, is conclusive. *Id.*

8. ———: ACKNOWLEDGMENT: STATUTE. The provision of our statutes requiring an officer taking an acknowledgment of a deed to certify that the grantor was personally known to him, was first enacted February 14th, 1825, (Laws, p. 215, § 10,) and hence did not apply to a deed acknowledged prior thereto. *Ib.*

DEED, DELIVERY OF. *Miller v. Lullman*, 311.

SEE EQUITY, 1.

MINOR, 1.

TAXES, 3, 4.

DEMAND.

SEE PROMISSORY NOTES, 2.

#### DEPOSITIONS.

1. DEPOSITIONS: COMMISSIONS, HOW ADDRESSED. Commissions to take depositions need not, under our statutes, be addressed to any particular officer or place. *Borders v. Barber*, 636.
2. ———: OFFICIAL CHARACTER AND VENUE OF OFFICER. Where the official character of the officer certifying to depositions and the venue of his office appear with reasonable certainty from his certificate and the caption read together, it is sufficient in that regard. *Ib.*
3. ———: CAPTION: NOTICE: VARIANCE. Where the caption to the deposition of a witness showed that it was taken between the hours of 9 a. m. and 4 p. m., and the notice designated between the hours of 8 a. m. and 6 p. m. of the same day: *Held*, the variance was immaterial, in the absence of any pretense that the deposition was taken at an unseasonable hour within the time prescribed, or that the opposite party was hindered in making a cross-examination, had he desired to do so. *Ib.*
4. ———: RETURN OF: CLERICAL ERRORS: JUDICIAL DISCRETION. The trial court may, in its judicial discretion, order a deposition to be returned to the officer before whom it was taken, for the correction of clerical or formal errors made by him. *Ib.*
5. ———: WHEN NOT ADMISSIBLE IN ANOTHER SUIT. Where the parties and issues in two suits are not the same, depositions taken in one cannot be read in evidence on the trial of the other. *Ib.*
6. ———: SECONDARY EVIDENCE, WHEN NOT ADMISSIBLE. Secondary evidence of the contents of a deposition cannot be read in evidence when the original has not been returned into court nor filed in the cause. *Carter v. Davis*, 668.

## DOWER.

1. DOWER, WHEN BARRED. Under Revised Statutes 1879, section 2204, a wife's dower in her husband's estate is not forfeited, unless she leaves him of her own free-will, and afterward lives in adultery, *Payne v. Dotson*, 145.
2. POST-NUPTIAL AGREEMENT, WHEN DOWER BARRED BY. Post-nuptial agreements for separation, and for the separate maintenance of the wife, through the intervention of a trustee, are valid, and, where accepted by the wife in lieu of dower, will be held to bar her dower right. *Garbut v. Bowling*, 214.

## DRAMSHOP KEEPER.

SEE CRIMINAL LAW, 18, 19.

## DRUGGISTS.

- DRUGGIST: PHYSICIAN. Under Revised Statutes 1879, section 5474, a druggist who is, also, a regularly registered physician, cannot furnish the prescription upon which he makes a sale of intoxicating liquor. *State v. Anderson*, 78.

## EASEMENTS.

SEE COVENANTS OF SEIZIN.

## EJECTMENT.

1. EJECTMENT: EVIDENCE. In an action of ejectment by a land owner to recover possession of land condemned for a right of way for a railroad, the record of the condemnation proceedings is admissible in evidence. *Gray v. The St. Louis & San Francisco Railway Company*, 126.
2. CONDEMNATION PROCEEDINGS: ESTOPPEL. Where the owner of land appeared by agent before commissioners, appointed in proceedings under the statute, (Gen. St. 1865, p. 352, §§ 1, 2, 3,) to condemn such land for a right of way for a railroad, and endeavored to increase the amount of their finding, and appeared in court by attorney and objected to the award because it was insufficient, but made no objection to the construction of the road, and took no legal steps to prevent its construction, he cannot maintain an action of ejectment against the railroad company to recover possession of the land. *Ib.*
3. EJECTMENT: PRIOR POSSESSION. Prior possession which is sufficient and necessary to maintain ejectment, must be visible, notorious, continued and actual, and must not differ from adverse possession. *Spurlock v. Dougherty*, 171.

4. **EJECTMENT: RENTS AND PROFITS, WHEN RECOVERABLE FOR PERIOD PREVIOUS TO SUIT.** Under Revised Statutes of 1879, section 2252, the right of the plaintiff in ejectment to recover the rents and profits of the premises for any period previous to the commencement of the suit, is predicated on the fact that the defendants had knowledge of the plaintiff's title, and it is only when such knowledge is brought home to the defendant that such recovery can be had. *Robidoux v. Cassleggi*, 459.

SEE EQUITY, 2.

LIMITATIONS, 6, 7, 8.

#### ELECTIONS.

- CONTESTED ELECTIONS: TRIAL OF: CONSTITUTION.** The authority which city councils may have possessed to hear and determine a contested election for city officers, was abrogated by section 9, article 8 of the constitution, which provides that "the trial and determination of contested elections of all public officers, whether State, judicial, municipal or local, except governor and lieutenant-governor, shall be by the courts of law or one or more of the judges thereof." *The State ex rel. Simmons, v. John*, 13.

#### EMBLEMENTS.

SEE LANDLORD AND TENANT, 2.

#### ENTRIES NUNC PRO TUNC.

1. **ENTRY NUNC PRO TUNC.** Before a record entry can be changed at a subsequent term by an entry *nunc pro tunc*, something in the record, the judge's docket, the clerk's minutes or papers on file must show that the record is in fact incorrect. *Atkinson v. The Atchison, Topeka & Santa Fe Railroad Company*, 51.
2. **JUDGMENT, NUNC PRO TUNC.** A record entry of a verdict found, together with an order for entry of judgment, is not a judgment, and where, in an action here on a judgment rendered in another state, such record entry is offered in evidence together with a formal judgment for plaintiff, entered of record eleven years thereafter, such judgment will be regarded as one *nunc pro tunc* of the date of the verdict and so held, although there was a stipulation of record of the date of the verdict authorizing the plaintiff to take judgment without further notice. *Smith v. Steel*, 455.

#### EQUITY.

1. **EQUITY: SHERIFF'S SALE: ANNULING DEED.** A deputy clerk of the court in which a judgment for costs was rendered, of his own motion, and improperly, issued an execution thereon and agreed with the deputy recorder of the county to buy in the land levied on under the execution, and the two, in pursuance of said agreement, purchased at the sheriff's sale 240 acres of land worth \$2,400, at less



than seven cents an acre, when two acres would have more than satisfied the execution, and received the sheriff's deed therefor; *Held*, equity will interfere and set aside said deed. *Beedle v. Mead*, 297

2. CLOUD ON TITLE: EQUITY: EJECTMENT. One out of possession, and whose land is sold under execution, the record under which the purchaser, at the sheriff's sale, claims, not disclosing on its face the infirmity of such purchaser's title, and recourse being necessary to extrinsic evidence to establish such infirmity, has the right to invoke the aid of a court of equity to have the sheriff's deed annulled, as a cloud on his title, and need not resort to ejectment. *Ib.*
3. CESTI QUE TRUST: RIGHT TO PROTECT SECURITY. A beneficiary in a deed of trust who purchases at the sale thereunder, but fails to obtain the legal title to the land, by reason of the absence from the sale of trustees named in the trust deed, still has such a *status* toward the property as to entitle him to come into a court of equity and seek the protection of his security. *Ib.*
4. EQUITABLE RELIEF: MISTAKE: PRIORITY. Where the beneficiary in a mortgage, in which the land intended to be conveyed is misdescribed, brings suit to have such mistake corrected, making the holder of a subsequent mortgage covering the same land a co-defendant with the mortgageor, alleging that the later mortgagee, when he took his mortgage, had knowledge of the mistake in the description of the land in the first mortgage, and asking that the lien of the first mortgage be declared prior to that of the second, if the evidence sustains the allegations of the petition, equity will correct the mistake and declare the lien of the first mortgage prior to that of the second. *Cox v. Esteb*, 393.
5. EQUITY: FINDING OF FACTS BY LOWER COURT, WHEN SUPREME COURT WILL NOT DISTURB IT. In an equity case where the trial court has the witnesses personally before it, and there is abundant evidence to sustain its finding of facts, the Supreme Court will not interfere and reverse such finding, unless it is clear it should have been otherwise. *Judy v. The Farmers & Traders' Bank*, 404.
6. DEED OF TRUST, RELEASE OF: WHEN SET ASIDE IN EQUITY. Equity will set aside a release of a deed of trust as against the heir of the grantor, where it appears such release was made by the trustee without the knowledge or consent of the *cestui que trust*, and without the debt secured by the deed of trust having been paid. *Armstrong v. Robards*, 445.
7. EQUITY: QUESTION OF FACT: EVIDENCE SUPPORTING DECREE. The question contained in this appeal being the validity and binding effect of an assignment of a trust fund; *Held*, this being a question of fact, and as the evidence, although conflicting, supports the decree, it is affirmed. *Parke v. Thompson*, 565.
8. ADMINISTRATION: SALE OF LAND FOR DEBTS: EQUITY. Equity will not permit heirs to hold possession of real estate together, with its increased value caused by improvements and expenditures made thereon in good faith by the administrators, and at the same time to resist the application of creditors to subject said property to the

payment of their debts, on the technical ground that the improvements and expenditures constitute waste, for which the creditors should resort to a suit on the administrators' bond, with the trouble, expense and delay incident thereto. *Van Bibber v. Julian*, 618.

SEE ADMINISTRATION, 8.

CONVEYANCE.

LAND AND LAND TITLES, 1.

PRACTICE, CIVIL, 6.

TRESPASS, 2.

TRUSTS AND TRUSTEES.

ESTOPPEL.

**BAILOR AND BAILEE: ESTOPPEL.** It is a general rule that a bailee of property cannot dispute the title of his bailor, and where defendant borrowed a pair of mules of plaintiff, and at the time made no mention of any claim to them by himself or wife, he will be estopped to claim them against plaintiff, on the ground that they were the joint property of plaintiff and defendant's wife, and that he was holding them with and for his wife. *Pulliam v. Burlingame*, 111,

SEE CONDEMNATION PROCEEDINGS, 1.

GARNISHMENT, 3.

GUARDIAN AND WARD, 5.

EVICITION.

SEE COVENANTS OF WARRANTY, 1.

EVIDENCE.

1. **RECORD ENTRY, CONTRADICTION OF.** The affidavit of an attorney in a case is not admissible to contradict the record entry, that a continuance was by consent. *Atkinson v. The Atchison, Topeka & Santa Fe Railroad Company*, 51.
2. **EJECTMENT: EVIDENCE.** In an action of ejectment by a land owner to recover possession of land condemned for a right of way for a railroad, the record of the condemnation proceedings is admissible in evidence. *Gray v. The St. Louis & San Francisco Railway Company*, 126.

3. **EVIDENCE: CORROBORATION AS TO IMMATERIAL FACTS.** Testimony offered for no other purpose than to corroborate a witness as to an immaterial fact, is properly excluded. *The State v. Brassfield*, 151.
4. **SEDUCTION: EVIDENCE OF PRIOR SPECIFIC ACTS.** In a prosecution under Revised Statutes 1879, section 1259, for seducing, under promise of marriage, "any unmarried female of good repute, under twenty-one years of age," evidence of specific acts of lewdness with others than defendant, prior to the alleged promise of marriage, is inadmissible. It is the reputation and the age of the female, and not her previous conduct, that bring her within the protection of the statute. *Ib.*
5. ———: **EVIDENCE OF SUBSEQUENT ACTS OF ILLICIT INTERCOURSE.** Evidence of acts of illicit intercourse on the part of the female, subsequent to the alleged seduction, is inadmissible. Such acts, so far from furnishing any defense or mitigation of the seducer's act, aggravate the offense. *Ib.*
6. ———: **EVIDENCE OF ILLICIT INTERCOURSE WITH OTHERS THAN DEFENDANT.** Evidence that the female alleged to have been seduced, had not had illicit intercourse with any other person than defendant, is irrelevant and immaterial, and is not a matter upon which evidence could be introduced to contradict her, and the paternity of the child is immaterial. *Ib.*
7. ———: **PRIOR INTERCOURSE WITH DEFENDANT.** Evidence tending to prove that the prosecuting witness and the defendant had sexual intercourse with each other prior to the date of the alleged promise of marriage, is admissible as conducing to show that the seduction was not accomplished under that promise. *Ib.*
8. ———: **PROMISE OF MARRIAGE: CORROBORATION.** The statute, (R. S. 1879, § 1912,) only requires that the prosecuting witness be corroborated as to the promise of marriage. The jury may find the fact of seduction upon the uncorroborated testimony of the prosecuting witness, and corroboration as to the promise is satisfied by proof of circumstances which usually attend an engagement of marriage. *Ib.*
9. ———: **PROMISE, WHEN MADE.** It is not necessary that the promise of marriage should either be made or formally renewed at the time of the seduction. It is only required to prove that defendant, under promise of marriage, whether made at the time or previously, accomplished the seduction, and that by reason of the engagement she consented to the illicit connection. *Ib.*
10. **TAX DEED: EVIDENCE.** A tax deed made by the county treasurer as *ex-officio* collector, is void and not admissible in evidence, in the absence of proof that the office of collector has devolved upon the treasurer by reason of the adoption of township organization by the county. *Spurlock v. Dougherty*, 171.
11. **WITNESS: CONVICTION OF.** The conviction of a witness cannot be proved by parol where defendant objects, but the record of such conviction must be produced. *The State v. Douglass*, 231.

12. ———: WHEN EXCLUDED. It is not error to refuse to allow witnesses to testify in a criminal cause, where it does not appear that they know anything of the matter in controversy, and when counsel, upon opportunity being offered by the court, refuses to make any statement showing the relevancy of the testimony offered. *Ib.*
13. EVIDENCE, EXCLUSION OF: ACTION OF TRIAL COURT, WHEN PRESUMED TO BE RIGHT. When documentary evidence, complained of as being improperly excluded by the trial court, does not appear in the bill of exceptions, the action of the trial court in excluding it will be presumed to be right. *Robidoux v. Casseleggi*, 459.
14. LOST INSTRUMENT, SECONDARY PROOF AS TO: WHEN FOUNDATION FOR INSUFFICIENT. Before secondary proof of the contents of a paper can be read in evidence, there must be proof of such search by the party who had custody of it as to reasonably warrant the conclusion that it is either destroyed, lost or mislaid, and cannot be found. Where the witness examined as to its existence states that, although he has looked for it, he may still have it in his possession, the foundation for secondary proof is not sufficiently laid. *Blondeau v. Sheridan*, 545.
15. COVENANTS IN DEED: CONTEMPORANEOUS PAROL CONTRACT INADMISSIBLE TO CHANGE. One who accepts a deed to real estate, with an express covenant therein to warrant and defend the title thereto against the claim of any person whomsoever, save and except the taxes of a certain specified year, cannot afterwards claim that the covenantor, by a parol contract contemporaneous with the deed, agreed to pay the taxes so expressly excepted from the operation of said covenant. *MacLeod v. Skiles*, 595.
16. CONTRACT, PART PAROL: EVIDENCE. When part only of an entire contract is reduced to writing, the remainder may be proved by parol, yet the latter must be consistent with and not contradictory of the written part. *Gardner v. Mathews*, 627.
17. ———: WHEN NOT ADMISSIBLE IN ANOTHER SUIT. Where the parties and issues in two suits are not the same, depositions taken in one cannot be read in evidence on the trial of the other. *Ib.*
18. ———: SECONDARY EVIDENCE, WHEN NOT ADMISSIBLE. Secondary evidence of the contents of a deposition cannot be read in evidence when the original has not been returned into court nor filed in the cause. *Carter v. Davis*, 668.
19. FRAUDULENT CONVEYANCE: EVIDENCE. Where mines are sold under a deed of trust and ore taken therefrom after such sale is levied on and sold by the sheriff under execution in favor of a judgment creditor of the grantor in the deed of trust, and the purchaser at the sale, under the trust deed, brings suit for conversion against the sheriff, it is competent for the latter to impeach the sale under the deed of trust as fraudulent and void, and to show that the mines, after the sale, were carried on by the grantor for his own use, although in the name of the purchaser, and that the ore levied on, was in truth, the property of the grantor. *The State ex rel. Mastin v. McBride*, 349.

SEE ADMINISTRATION, 5.

CARRIERS, 1.

CONTRACTS, 4. 5.

NEGLIGENCE, 2.

PRACTICE, CRIMINAL, 1.

TAXES, 7.

### EXECUTIONS.

1. **TAXES, SUIT TO ENFORCE COLLECTION: EXECUTION, MOTION TO QUASH BY STRANGER.** A stranger to the action, in a suit to enforce the lien of the State for taxes against land, cannot come into court and move to quash the execution and levy upon the ground that he is the true owner of the land, and has not been served with notice of the pendency of the suit. The title to real estate cannot be tried in such manner. The parties are entitled to a jury and time to prepare for trial. If such stranger was not a party defendant in the action to enforce the tax lien, his rights of property in the land were in no way affected thereby. *The State ex rel. Carter v. Clymer*, 122.
2. **HOMESTEAD EXEMPTION: PRE-EXISTING DEBT.** A homestead is not exempt from execution for a debt created before its acquisition whether the debt was created in this State or elsewhere. And the date of the filing of the deed will be held to be the time when the homestead was acquired. *O'Shea v. Payne*, 516.

SEE EQUITY, 1.

FRAUD, 1.

INDEMNIFYING BOND, 1.

INSANE PERSONS, 9.

LAND AND LAND TITLES, 2.

REPLEVIN, 4.

### FENCES.

SEE RAILROADS, 2, 3, 5.

### FORGERY.

SEE PLEADING, CRIMINAL, 5.



## FRAUD.

1. **FRAUDULENT CONVEYANCE: EVIDENCE.** Where mines are sold under a deed of trust and ore taken therefrom after such sale is levied on and sold by the sheriff under execution in favor of a judgment creditor of the grantor in the deed of trust, and the purchaser at the sale, under the trust deed, brings suit for conversion against the sheriff, it is competent for the latter to impeach the sale under the deed of trust as fraudulent and void, and to show that the mines, after the sale, were carried on by the grantor for his own use, although in the name of the purchaser, and that the ore levied on, was in truth, the property of the grantor. *The State ex rel. Mastin v. McBride*, 349.
2. **REPLEVIN: FRAUDULENT SALE: POSSESSION.** Defendant, as sheriff levied an attachment upon a number of sheep in favor of an execution creditor. Plaintiff claimed them by virtue of a bill of sale from the execution debtor, and brought an action of replevin against defendant for their possession. The consideration of the sale to plaintiff was an antecedent debt, and the sheep in question had never been separated from other sheep of the vendor, nor taken from the latter's possession; *Held*, that the sale was void as to the creditors of the vendor, and that plaintiff was not entitled to their possession. R. S. 1879, § 2505. *Crane v. Timberlake*, 431.

## FRAUDULENT CONVEYANCES.

SEE FRAUD.

## GARNISHMENT.

1. **GARNISHMENT: SERVICE OF PROCESS.** A justice of the peace is not empowered to appoint any one to serve the extraordinary process of attachment by garnishment, and credits in the garnishee's hands cannot be legally attached by the use of such process. *Fletcher v. Wear*, 524.
2. ———: ———. In the absence of a declaration of attachment by the sheriff or constable serving the writ, a garnishee can confer no jurisdiction upon a justice of the peace to make an order of delivery or of payment, which will bind the property or credits of the debtor in his hands, and when, at any time, such want of jurisdiction appears, the garnishee should be discharged. *Id.*
3. ———: ———: **ESTOPPEL.** A garnishee may, by his negligence in pleading, or by consent, expressed or implied, invite or permit an order of delivery or payment which will be binding upon himself, while it fails to bind any one else, or any other's property. But, an order binding on the garnishee alone would constitute no protection against a second payment of the same credits by him, and courts should avoid this hardship by discharging the garnishee while they have control of the proceeding. *Id.*

## GUARDIAN AND WARD.

1. **INSANE PERSON: ANSWER OF GUARDIAN.** The answer of the guardian of an insane person, admitting the execution by his ward of the instrument sued on, but alleging that he was at the time of unsound mind, is equivalent to a plea of *non est factum*, for while it admits the manual act of signing, it denies the consenting mind, without which no act can possess any contractual force. It stands upon the same footing as the answer of a guardian *ad litem* of an infant. *Collins v. Trotter*, 275.
2. ———: **INFANT: GUARDIAN AD LITEM: ADMISSIONS OF.** The guardian *ad litem* of an infant can waive nothing and admit nothing against his ward, but the adversary of such infant must prove his whole case, whether it be one in equity or at law. And the same rule applies in the case of a lunatic. *Ib.*
3. ———: **INFANT: ADMISSIONS OF GUARDIAN.** The guardian of an insane person, like the guardian *ad litem* of an infant, may raise issues by his pleadings whenever he thinks it for the benefit of his ward, but whatever points are tendered, or admissions made, for the purpose of pleading, cannot be used against the person in ward. *Ib.*
4. **GUARDIAN OF INSANE PERSON: WAIVER BY.** The general guardian of an insane person, unlike the guardian *ad litem* of an infant, can act in regard to his ward's interest like an ordinary litigant, and waive objections to the admission of testimony, the same as if acting in his own right. *Sherwood, J., dissenting. Ib.*
5. **GUARDIAN, APPOINTMENT OF: PLEADING.** In pleading the appointment of a guardian by the probate court, the statute, (R. S. 1879, § 3551,) controls, and the facts conferring jurisdiction need not be more fully stated than therein required. And no objection can afterward be made where it is admitted on the trial that such appointment was duly made, anterior to the trial. *Ib.*
6. **PLEADING: PARTIES: INSANE PERSON: GUARDIAN.** An insane husband who is under guardianship, cannot be joined in a suit with his wife. It is the duty of the guardian of an insane person to prosecute and defend all actions instituted in behalf of or against his ward. *Hays v. Miller*, 424.

## HOMESTEADS AND EXEMPTIONS.

1. **HOMESTEAD, CONVEYANCE OF: PROPERTY OF WIFE: EXEMPTION.** Where a husband and wife, having a homestead in the state of Kansas, conveyed the same, and in part consideration therefor, their grantee conveyed to the wife land in this State, and by the law of Kansas in force at the time of the conveyances, the homestead was not subject to the debts of either the husband or wife, and could only be disposed of with their joint consent, the conveyance of the land in this State to the wife was not in fraud of creditors, and it could not, therefore, be subjected to the debts of the husband. *Stinde v. Behrens*, 254.

2. **HOMESTEAD EXEMPTION: PRE-EXISTING DEBT.** A homestead is not exempt from execution for a debt created before its acquisition whether the debt was created in this State or elsewhere. And the date of the filing of the deed will be held to be the time when the homestead was acquired. *O'Shea v. Payne*, 516.

#### HOMICIDE.

1. **CRIMINAL LAW: MANSLAUGHTER IN FOURTH DEGREE.** Where a defendant, on trial for murder, testified that the deceased, after a quarrel, knocked her down and threw himself upon her, falling upon a knife in her hand, whereby he was unintentionally killed, an instruction should be given for manslaughter in the fourth degree, under the provisions of Revised Statutes 1879, § 1249. *The State v. Douglass*, 231.
2. ———: ———. Where there is evidence to the effect that a killing was intentionally done, in the heat of passion caused by a blow, an instruction should be given for manslaughter in the fourth degree, under the provisions of Revised Statutes 1879, § 1250. *Ib.*
3. **PLEADING, CRIMINAL: INDICTMENT.** An indictment for murder which avers that the striking and wounding were in the heart, and that the mortal wound, so given, was through the body, is not repugnant, and the wound need not be described. *The State v. Henson*, 384.
4. ———: INSTRUCTIONS. It is not error to refuse an instruction for murder in the second degree, where the evidence does not show the commission of that grade of offense. *The State v. Cillins*, 652.

#### HUSBAND AND WIFE.

1. **JUDGMENT AGAINST A MARRIED WOMAN AND OTHERS SUI JURIS NOT VOID AS TO LATTER.** A judgment rendered jointly against a married woman and others who are *sui juris* is not, as to the latter, void and collaterally assailable, although as to the married woman, it is a nullity, and although it is, also, an entirety for the purposes of review appeal or writ of error, and would be reversed as to all the defendants, if thus directly assailed. *Holton v. Towner*, 360.
2. **REPLEVIN: MARRIED WOMAN.** A married woman cannot maintain an action of replevin, for the recovery of possession of personal property, in her own name. *Hays v. Miller*, 424.
3. **HUSBAND AND WIFE: HER SERVICES RENDERED ANOTHER, WHEN HER SEPARATE EARNINGS.** Services performed by a wife, for another for compensation, are presumed to be given on the husband's behalf. This was the case at common law and has not been changed by statute, and to rebut such presumption, the wife must show that the services were rendered under circumstances indicating an intention or understanding that she should receive the pay therefor. *Plummer v. Trost*, 425.

SEE HOMESTEADS AND EXEMPTIONS, 1.

## IDEM SONANS.

SEE CRIMINAL LAW, 16.

## INDEMNIFYING BOND.

1. SHERIFF: INDEMNIFYING BOND: CLAIMANT OF, PROPERTY WHEN NOT LIMITED TO. In the absence of statutory prohibition, the claimant of property levied on by a sheriff, and as to which an indemnifying bond has been given the officer, is not restricted to his remedy on the bond, but may sue the sheriff for the trespass or conversion. *The State ex rel. Mastin v. McBride*, 349.
2. STATUTE, CONSTRUCTION OF. The provisions of the Revised Statutes of 1879, do not prohibit such common law action against the sheriff for trespass or conversion, where an indemnifying bond has been given. *Ib.*

## INFANTS.

SEE GUARDIAN AND WARD, 2, 3.

JUDGMENTS, 3.

## INJUNCTION.

INJUNCTION: STATUTE. Injunction may be resorted to under Revised Statutes 1879, section 2722, notwithstanding there may be an adequate remedy at law for the injury, in all cases where such adequate remedy cannot be afforded by an action for damages as such. *Towne v. Bowers*, 491.

## INSANE PERSONS.

1. INSANE PERSON: STATUTES CONSTRUED. Revised Statutes 1879, sections 3653 and 3654, are not applicable to a case where the suit is against a person of unsound mind, and answer is made by his guardian. They can only be applicable to persons of sound mind. *Collins v. Trotter*, 275.
2. ———: ANSWER OF GUARDIAN. The answer of the guardian of an insane person, admitting the execution by his ward of the instrument sued on, but alleging that he was at the time of unsound mind, is equivalent to a plea of *non est factum*, for while it admits the manual act of signing, it denies the consenting mind, without which no act can possess any contractual force. It stands upon the same footing as the answer of a guardian *ad litem* of an infant. *Ib.*
3. ———: INFANT: GUARDIAN AD LITEM: ADMISSIONS OF. The guardian *ad litem* of an infant can waive nothing and admit nothing against his ward, but the adversary of such infant must prove his

whole case, whether it be one in equity or at law. And the same rule applies in the case of a lunatic. *Ib.*

4. DEAF MUTE: BURDEN OF PROVING COMPETENCY. A deaf mute is *prima facie* incompetent to make any contract, and the burden of proving his competency is upon his adversary in the suit. *Ib.*
5. INSANE PERSON: INFANT: ADMISSIONS OF GUARDIAN. The guardian of an insane person, like the guardian *ad litem* of an infant, may raise issues by his pleadings whenever he thinks it for the benefit of his ward, but whatever points are tendered, or admissions made, for the purpose of pleading, cannot be used against the person in ward. *Ib.*
6. GUARDIAN OF INSANE PERSON: WAIVER BY. The general guardian of an insane person, unlike the guardian *ad litem* of an infant, can act in regard to his ward's interest like an ordinary litigant, and waive objections to the admission of testimony, the same as if acting in his own right. SHERWOOD, J., dissenting. *Ib.*
7. PLEADING: PARTIES: INSANE PERSON: GUARDIAN. An insane husband who is under guardianship, cannot be joined in a suit with his wife. It is the duty of the guardian of an insane person to prosecute and defend all actions instituted in behalf of or against his ward. *Hays v. Miller*, 421.
8. INSANE PERSONS: ACTION AGAINST. Process and judgment go against insane persons as against other parties, but they should defend by attorney or guardian. *Heard v. Sack*, 610.
9. JUDGMENT AGAINST INSANE PERSON: PURCHASER AT SALE UNDER: WHEN PROTECTED. A purchaser takes a valid title to property who, without notice of the fact of insanity, buys at an execution sale under a judgment rendered against an insane person on personal service, although without his appearance in person, or by attorney or guardian. *Ib.*

#### INSTRUCTIONS.

1. PRACTICE, CRIMINAL: INSTRUCTIONN. The giving of an instruction authorizing a greater punishment than allowed by law, will not constitute reversible error where the jury assess the minimum punishment allowed by law. *The State v. Burr*, 108.
2. RAILROADS: DUTY TO FENCE: DAMAGES: INSTRUCTIONS. An instruction which declares that it is the duty of a railroad company to erect and maintain lawful fences with gates therein, as required by statute, and until it does so, it is liable in double the amount of damages done to stock by its engines and cars, is too broad and general. It should be qualified by the further statement that if the injury was occasioned by such failure to fence, the company would be liable. *Ridenore v. Wabash, St. Louis & Pacific Railway Company*, 227.



3. **INSTRUCTION.** An instruction in this case asked by plaintiff as to his title, and the defense of the Statute of Limitations, approved. *Childs v. Thompson*, 337.
4. **PRACTICE CRIMINAL: INSTRUCTION.** An instruction need not be as technical as an indictment, and it is sufficient to charge that, if defendant falsely made and forged the note in question, with intent to injure and defraud, the jury should convict. It need not declare that the jury, in order to convict, must find that defendant falsely, fraudulently and feloniously made and forged the instrument. *Ib.*
5. **PRACTICE IN SUPREME COURT: INSTRUCTIONS.** Where there is any thing in the pleadings, the testimony or instructions to warrant the conclusion that but for the faulty phraseology of an instruction complained of, the jury would not have found a verdict, the Supreme Court will reverse the judgment, but otherwise, when from all of the instructions the jury could not have misconstrued the one complained of. *Cooper v. Johnson*, 483.
6. **INSTRUCTIONS.** Instructions asked are properly refused when embraced in others given. *Ib.*
7. **PRACTICE IN SUPREME COURT: LOST INSTRUCTION.** The Supreme Court will not reverse a judgment because a refused instruction asked on behalf of the defendant is lost or mislaid, and, therefore, omitted from the transcript, it appearing that the other instructions given in the cause, and contained in the transcript, fully covered the law of the case. *The State v. Hayes*, 574.
8. **CRIMINAL LAW.** Where there is evidence to the effect that a killing was intentionally done, in the heat of passion caused by a blow, an instruction should be given for manslaughter in the fourth degree, under the provisions of Revised Statutes 1879, § 1250. *The State v. Douglass*, 231.

SEE CONTRACTS, 6.

NEGLIGENCE, 7.

PRACTICE, CRIMINAL, 13.

PRACTICE IN SUPREME COURT, 1, 3, 5.

INSURANCE.

1. **INSURANCE: PENALTIES.** The penalties prescribed by Wagner Statutes, section 43, page 777, for transacting in this State by foreign companies, the business of life insurance without the requisite certificate, are visited upon the resident agents of such companies, and not upon the companies. *The State ex rel. Boogher v. The New York Life Insurance Company*, 89.
2. **DEED OF TRUST: INSURABLE INTEREST OF TRUSTER.** A trustee in a deed of trust in the nature of a mortgage, has an insurable interest in the mortgaged property, distinct from that of the mortgageor. *Dick v. The Franklin Fire Insurance Company of Philadelphia*, 103.

3. ———: ———: CONVEYANCE BY MORTGAGEOR. A conveyance by the mortgageor in no way affects the trustee's right to insure his interest. *Ib.*
4. ———: ———: ASSIGNMENT: BENEFICIARY. Where the trustee insures his interest in the mortgaged property, and the policy stipulates that he shall, in case of a loss, assign to the insurer an interest in the deed of trust equal to the amount of loss paid, provided such assignment shall, in no way, prejudice the beneficiary's claim in the trust to recover the full amount of his loan, and proper charges, the trustee cannot recover for a loss until he shall have performed his agreement to assign. *Ib.*
5. ———: ———: ———: SUBROGATION CLAUSE: RECOVERY. In such case the subrogation clause is material, and there can be no recovery against the insurer for a loss until this condition precedent is fulfilled, even though the mortgaged property is not worth the amount of the debt secured, less the amount the insured is liable to pay. *Ib.*
6. THE insurance in this case is held to be of the interest of the trustee, and not of the mortgageor. *Ib.*
7. MUTUAL BENEFIT ASSOCIATION: BENEFITS, TO WHOM PAYABLE. Where the charter of a mutual benefit association provides for the payment to the member's family, or appointee, of a certain sum upon the member's death, and that "in case no direction is made by a brother, the same shall be paid to the person or persons entitled thereto," upon the death of a member without having named a beneficiary, the benefits are payable to the wife and children, and not to the administrator of the deceased member. *Fenn v. Lewis*, 259.

## INTEREST.

## SEE ADMINISTRATION.

## PROMISSORY NOTES, 4.

## TRUSTS AND TRUSTEES.

## JUDGMENTS.

1. PRACTICE: PLEADING: JUDGMENT. A judgment should be responsive to the issues presented in the pleadings, and where it is not, it should be reversed. *Ross v. Ross*, 84.
2. JUDGMENT AGAINST A MARRIED WOMAN AND OTHERS SUI JURIS NOT VOID AS TO LATTER. A judgment rendered jointly against a married woman and others who are *sui juris* is not, as to the latter, void and collaterally assailable, although as to the married woman, it is a nullity, and although it is, also, an entirety for the purposes of review appeal or writ of error, and would be reversed as to all the defendants, if thus directly assailed. *Holton v. Towner*, 360.

2. **INFANT: APPEARANCE BY ATTORNEY.** A judgment will not be reversed because an infant appeared to the action by an attorney where the judgment is in his favor. *R. S.*, 382.5½ *Ib.*
4. **JUDGMENT, NUNC PRO TUNC.** A record entry of a verdict found, together with an order for entry of judgment, is not a judgment, and where, in an action here on a judgment rendered in another state, such record entry is offered in evidence together with a formal judgment for plaintiff, entered of record eleven years thereafter, such judgment will be regarded as one *nunc pro tunc* of the date of the verdict and so held, although there was a stipulation of record of the date of the verdict authorizing the plaintiff to take judgment without further notice. *Smith v. Steel*, 455.
5. **JUDGMENTS: MOTION TO SET ASIDE.** Irregular judgments may be set aside on motion filed any time within three years after the term at which such judgment may have been rendered. *Showles v. Freeman*, 540.
6. **ADMINISTRATORS, JUDGMENT AGAINST.** The judgment in an action against an administrator, should not be against him personally, but against him in his representative capacity. *Blondeau v. Sheridan*, 545.
7. **INSANE PERSONS: ACTION AGAINST.** Process and judgment go against insane persons as against other parties, but they should defend by attorney or guardian. *Heard v. Sack*, 610.
8. **JUDGMENT AGAINST INSANE PERSON: PURCHASER AT SALE UNDER: WHEN PROTECTED.** A purchaser takes a valid title to property who, without notice of the fact of insanity, buys at an execution sale under a judgment rendered against an insane person on personal service, although without his appearance in person, or by attorney or guardian. *Ib.*

#### JUDICIAL DISCRETION.

SEE DEPOSITIONS, 4.

#### JUDICIAL NOTICE.

1. **JUDICIAL NOTICE: PROSECUTING ATTORNEY: INDICTMENT.** A court is bound to take judicial notice of its own officers, and will notice their signatures, whether their official designations are added or omitted. Where an indictment is, in fact, signed by the prosecuting attorney, it makes no difference that he is designated "circuit attorney:" the error is an immaterial one, and constitutes no ground for a motion to quash. *The State v. Kinney*, 101.
2. **——: TOWNSHIP ORGANIZATION.** Courts will not take judicial notice of the adoption of township organization, but the party seeking to avail himself of it must prove it by extrinsic evidence. *Spurlock v. Dougherty*, 171.

## JURISDICTION.

1. JUSTICE OF THE PEACE, JURISDICTION OF. A justice of the peace has no jurisdiction to try a suit brought by the grantee under a warranty deed against the grantor to recover taxes paid by the former, and which the latter, by the terms of his warranty, was required to pay. *Patterson v. Yancy*, 379.
2. GARNISHMENT. In the absence of a declaration of attachment by the sheriff or constable serving the writ, a garnishee can confer no jurisdiction upon a justice of the peace to make an order of delivery or of payment, which will bind the property or credits of the debtor in his hands, and when, at any time, such want of jurisdiction appears, the garnishee should be discharged. *Fletcher v. Wear*, 524.

SEE ATTACHMENT, 2, 4.

## JURY.

1. JURY: EVIDENCE. The jury are the judges of the weight of the evidence and the credibility to be given to the witnesses, and a judgment will not be reversed because the evidence is conflicting. *The State v. Kinney*, 101.
2. JURORS, UNDERSTANDING OF ORDINARY ENGLISH WORDS. Jurors are presumed to understand the meaning of ordinary English words, and to know that to "countenance" an act is to aid in or abet it, and that one by mere silence at the time, or approval of an act after its commission, cannot be held thereby to countenance the same or be held liable therefor. *Cooper v. Johnson*, 483.
3. MOTION FOR NEW TRIAL: EXCEPTIONS: PRACTICE IN SUPREME COURT. Where a party fails to except to the action of the court in overruling his motion for new trial, he will be held to have acquiesced therein, and the Supreme Court will not consider matters called to the attention of the trial court by such motion, but will affirm the judgment if it be supported by the pleadings. *McIrvine v. Thompson*, 474.

## JUSTICES' COURTS.

1. JUSTICES OF THE PEACE, AUTHORITY OF: NONSUIT, MOTION TO SET ASIDE. A justice of the peace has only such authority as the statute gives him. He has no general power to set aside verdicts, and can only set aside nonsuits when entered on account of the absence of the plaintiff. Where the plaintiff is present when the nonsuit is entered, he has the right to appeal without filing a motion to set it aside. *Weeks v. Etter*, 375.
2. JUSTICE OF THE PEACE, JURISDICTION OF. A justice of the peace has no jurisdiction to try a suit brought by the grantee under a warranty deed against the grantor to recover taxes paid by the former, and which the latter, by the terms of his warranty, was required to pay. *Patterson v. Yancy*, 379.

3. JUSTICES OF THE PEACE: EXTENSION OF TERMS OF OFFICE: STATUTE. The effect of section 2807, Revised Statutes, 1879, in reference to the election and terms of office of justices of the peace, was to supersede and repeal all prior statutes authorizing directly, or by implication, any elections of such officers prior to the general election in November, 1882, and any election so held in contravention of said section, was unauthorized and void. Following and affirming *State ex rel. Attorney General v. Ranson*, 73 Mo. 78. *The State ex rel. The Circuit Attorney v. McCann*, 479.

SEE GARNISHMENT, 1, 2

#### LAND AND LAND TITLES.

1. BOND TO PERFECT TITLE. A bond recited a sale of land by one of the obligors therein to M., and concluded as follows: "Now upon the perfecting of the title of said lot in and to the said M. by the undersigned, this bond to be void." *Held*, that the obligors must, by the terms of the bond, remove an incumbrance upon the land at the time of the sale, as well as otherwise perfect the title. *Montgomery v. Harker*, 63
2. LAND WHEN NO INTEREST IN SUBJECT TO EXECUTION. Where the equitable title to land with the right to its possession are acquired in the name of one person, but, in fact, belongs to and is held in trust for another, the former is not beneficially interested in the land, and has, therefore, no interest subject to levy and sale under execution against him. *Quell v. Hanlin*, 441.
3. SALE OF LAND: CONDITION BROKEN: RE-ENTRY: CLAIM. The remedy of the grantor of land, who has the right to re-enter for condition broken, is to enter, and when he cannot enter he must make a claim, and no one can make it for him except the heir. *Towne v. Bowers*, 491.
4. COVENANTS RUNNING WITH LAND: TENANTS IN COMMON. Tenants in common can maintain a joint action for breaches of covenants running with the land. *Blondeau v. Sheridan*, 545.

SEE COVENANTS AGAINST INCUMBRANCES, 2.

COVENANTS OF SEIZIN, 1.

COVENANTS OF WARRANTY, 1.

#### LANDLORD AND TENANT.

1. TENANT: GROWING CROP. Defendant who was in possession of land, under a contract for its purchase, sowed a crop of wheat, and then, by mutual consent of himself and his vendor, the contract was cancelled, and a new similar one was made by the vendor with H., and it was agreed by the latter that defendant should retain possession as tenant without paying rent while his crop was growing, until the land could be sold, defendant at the time stating that he claimed



the crop and intended to gather it. Plaintiff took a transfer of H.'s contract, and received a surrender of the premises from defendant, with the understanding, to which he made no objection, that the latter so claimed the crop and intended to gather it; *Held*, defendant was entitled to the crop. *Towne v. Bowers*, 491.

2. EMBLEMENTS: TENANT AT WILL. A tenant at will is entitled to emblements, and to that end the law gives him the right of ingress and egress to gather his crop. *Ib.*

### LARCENY.

SEE CRIMINAL LAW, 11.

### LAWS.

LAWS, EX POST FACTO, RETROSPECTIVE, CONSTITUTIONAL. Revised Statutes 1879, section 1655, authorizing the conviction of a defendant "of any offense, the commission of which is necessarily included in that charged," is not an *ex post facto* law, or retrospective in its operation, (Const. 1875, art. 2, § 15,) when applied to a case in which the offense was committed and the indictment found prior to the taking effect of said section and the trial had thereafter, notwithstanding such conviction was not authorized by the law in force at the time the offense was committed and indictment found. 2 Wag. Stat., § 1, p. 852. *The State v. Johnson*, 60.

### LEASE.

1. LEASE UNDER SEAL: SURRENDER OF. A lease under seal may be surrendered or changed by a subsequent parol contract, or by a contract in writing under seal, or without seal. *Prior v. Kiso*, 241.
2. SURETIES FOR PAYMENT OF RENT: CHANGE OF CONTRACT: RELEASE. Sureties who contract for the payment of rent by two lessees jointly, are discharged by an agreement by the lessor, without their consent, that one of the lessees may retire from the leased premises and that the lessor will look to the other lessee for the rent. *Ib.*
3. LESSOR RECEIVING BACK MATERIAL PART OF PREMISES: SURETIES. And if the lessor, without the consent of such sureties, receives back from the lessees a material part of the leased premises, the sureties will be discharged. *Ib.*
4. LESSEE RECEIVING PART OF PREMISES: WAIVER. Where a lessee accepts less of the premises than he is entitled to demand under his contract, and holds the same, as in this case, for a period of fifteen months, it is a question for the jury to determine whether or not he has waived a full performance of the contract on the part of the lessor. *Ib.*
5. ———: RENT PRO TANTO. Where the lessee obtains only part of the leased premises without assenting to the withholding of the residue, the lessor can only recover rent *pro tanto* for the part received. *Ib.*

## LEIN.

1. **MECHANICS' LIEN: LEASEHOLD: MACHINERY.** Sections 1 and 4, Wagner's Statutes, pp. 907, 908, (R. S. 1879, §§ 3172, 3175,) concerning mechanics' liens, while they extended the lien to a building or improvement, the latter term being synonymous with the former, erected by a tenant upon leased premises with power of removal, did not extend it to engines, boilers and machinery erected by him thereon, unless the same were used in the construction of the building, or improvement, or were afterward connected therewith and became a part of the building itself for some permanent object, so as to go and pass with it as a constituent part thereof. *Richardson v. Koch*, 264.
2. **LIEN, SALE TO SATISFY: SUBROGATION.** Where one has become a purchaser in good faith, under a sale which proves to be void for irregularity, and the purchase money has been applied to a satisfaction of the lien for which the sale was ordered, the purchaser becomes subrogated to the rights of the lien-holder to the extent of his payment, but when the proceedings are regular in all respects, and the decree is effectual in subjecting to its behests the interests and estates of all parties before the court, such subrogation, especially in the absence of fraud, will not be made. *Burden v. Johnson*, 318.

## LIMITATIONS.

1. **MORTGAGE: LIMITATION, STATUTE OF.** The mortgage ceases to exist as soon as the debt, it is given to secure, is paid, but so long as the debt is kept alive, the mortgage lien remains in full force, and any acknowledgment or promise of the debtor sufficient to prevent the statute of limitations from running against the debt, equally prevents the statutes from running upon the mortgage. *Johnson v. Johnson*, 331.
2. **LIMITATIONS: MORTGAGE: REVIVOR OF DEBT.** When the bar of the statute of limitations is complete, any act of the mortgagee which revives the debt, also revives the lien of the mortgage, unless the parties agree otherwise, or unless such revivor affects the rights of purchasers and mortgagees acquiring title after the bar is complete, and before the act of revivor. *Ib.*
3. **LIMITATIONS, STATUTE OF: BACK TAXES.** The statute of limitations does not run against a demand of the State for delinquent taxes. *The State ex rel. Ellison v. Piland*; 519.
4. **COVENANTS OF WARRANTY: BREACH OF: STATUTE OF LIMITATIONS.** Where there has been no decision against the paramount title, and within ten years after its extinguishment by the covenantee he brings his action on the covenant of warranty, he is not barred by the statute of limitations. *Blondeau v. Sheridan*, 545.
5. **COUNTY WARRANT: LIMITATION.** An action on a county warrant is not barred by the statute of limitations if commenced within ten years after the cause of action accrued. *Valleau v. Newton County*, 591.

6. **EJECTMENT: TITLE: LIMITATION.** One who shows no color or claim of title to land, in order to acquire title thereto by adverse possession and limitation, must show by a preponderance of testimony and to the satisfaction of the court or jury, that he and those under whom he claims, have had the actual, continuous, uninterrupted and adverse possession of the same for not less than ten years before commencement of suit for recovery of its possession. *Huckshorn v. Hartwig*, 648.
7. ———: ———: ———. Where one, and those under whom he claims, entered upon and occupied land by mistake as to the true boundary line between such land and an adjoining tract, but only intending to claim to the line, as it might be subsequently ascertained, then such possession is not adverse to the true owner, and a title by limitation cannot be acquired thereby. *Ib.*
8. ———: ———: ———. Where defendant, within ten years before the commencement of suit, and before he had had ten years' possession of land, stated to plaintiff that he only claimed to the true line between their lands, and would be governed by the survey whenever a correct line was made, then his possession of the tract in dispute from that date would not be adverse to plaintiff, if on a correct survey it should be found to be part of the tract described by its numbers in plaintiff's petition, although defendant may have stated at the time that he claimed the line to which he then held to be the true one. *Ib.*

SEE INSTRUCTIONS, 3

TAXES, 5.

#### LOST INSTRUMENT.

SEE EVIDENCE, 14.

#### LUNATICS.

SEE INSANE PERSONS.

#### MANDAMUS.

SEE OFFICES AND OFFICERS, 1.

#### MANSLAUGHTER.

SEE HOMICIDE.

#### MARRIAGE.

SEE CRIMINAL LAW, 21.

## MARRIED WOMEN.

SEE HUSBAND AND WIFE.

## MECHANIC'S LIEN.

SEE LIEN, 1.

## MINOR.

1. DEED OF MINOR, DISAFFIRMANCE OF. The warranty deed of a minor will not have the effect of disaffirming his prior mortgage deed to the same property. *The Singer Manufacturing Company v. Lamb*, 221.
2. ———. The deed of a minor is not void, but only voidable after he reaches his majority. And the right to disaffirm may be exercised by his heirs and representatives within the time permitted to him to do the act. *Ib.*
3. ———. It requires no affirmative act to continue the validity of a minor's deed after he reaches his majority, but it remains valid in all respects like the deed of an adult, until expressly repudiated, or he does some act implying a repudiation of the voidable instrument. But the disaffirming act need take no particular form or expression; but if such act be consistent with the continued validity of the minor's deed, the latter will not thereby be disaffirmed. *Ib.*
4. ———. A quit-claim deed made after attaining majority, will not have the effect to disaffirm a mortgage made during minority, as the two instruments are consistent with each other, and can stand together, the quit-claim deed only purporting to convey the estate remaining in the grantor at the time of its execution. *Ib.*
5. ———. The right to disaffirm the mortgage of a minor is a personal privilege, and cannot, during the life of the grantor, and in the absence of express language to that effect, be considered as an inherent part of the title transferred by his subsequent quit-claim deed made after attaining his majority. *Ib.*
6. MINOR CHILD, ACTS OF: FATHER NOT RESPONSIBLE FOR. A father is not responsible for the negligence or willful wrong of his minor child. *Needles v. Burk*, 569,

SEE DAMAGES, 1.

MISTAKE, 1.

PARENT AND CHILD.

## MISDESCRIPTION.

SEE CONVEYANCE.

## MISJOINDER OF PARTIES.

SEE PLEADING, 5.

## MISJOINDER OF CAUSES OF ACTION.

SEE PRACTICE CIVIL, 10.

## MISREPRESENTATIONS.

SEE MISTAKE.

## MISTAKE.

**MISTAKE OF LAW: MISREPRESENTATIONS: RECOVERY BACK OF MONEY PAID.** Where a minor child sets fire to and burns property of another, and the father, in ignorance of the fact that he is not legally liable therefor, pays the loss, he cannot recover it back, but it is otherwise if the father is induced to pay the loss by the fraudulent misrepresentation of the owner of the property that the child did the burning. *Needles v. Burk*, 569.

SEE EQUITY, 4.

PRACTICE, CRIMINAL, 4.

## MORTGAGES AND DEEDS OF TRUST.

1. **MORTGAGE OF STOCK OF GOODS, CONSTRUCTION OF: POWER TO SELL.** A mortgage of a stock of goods, furniture and fixtures in a store, which also includes in the conveyance all articles that might thereafter be added thereto, or which should be on hand at the time the mortgagee, under the provisions of the mortgage, should claim possession, does not thereby authorize a sale of any of the stock by the mortgageor. *St. Louis Drug Company v. Robinson*, 18.
2. **MORTGAGE, INCIDENT TO NOTE GIVEN TO SECURE.** A mortgage given to secure a note is regarded as incident thereto, and passes with such note to every holder at the time he receives it, without any transfer or assignment, distinct or separate from the paper the mortgage is given to secure. *Johnson v. Johnson*, 331.
3. **MORTGAGE: LIMITATION, STATUTE OF.** The mortgage ceases to exist as soon as the debt, it is given to secure, is paid, but so long as the debt is kept alive, the mortgage lien remains in full force, and any acknowledgment or promise of the debtor sufficient to prevent the statute of limitations from running against the debt, equally prevents the statutes from running upon the mortgage. *Johnson v. Johnson*, 331.
4. **LIMITATIONS: MORTGAGE: REVIVOR OF DEBT.** When the bar of the statute of limitations is complete, any act of the mortgageor which



revives the debt, also revives the lien of the mortgage, unless the parties agree otherwise, or unless such revivor affects the rights of purchasers and mortgagees acquiring title after the bar is complete, and before the act of revivor. *Ib.*

5. EQUITY: QUESTION OF FACT: EVIDENCE SUPPORTING DECREE. The question contained in this appeal being the validity and binding effect of an assignment of a trust fund; *Held*, this being a question of fact, and as the evidence, although conflicting, supports the decree, it is affirmed. *Parke v. Thompson*, 565.
6. MORTGAGE TO INDEMNIFY SURETIES: WHEN LATTER ENTITLED TO MORTGAGED PROPERTY. Where a mortgage is given to indemnify the mortgagees against loss as sureties of the mortgageor, the sureties, in the absence of a provision in the mortgage authorizing it, are not entitled to possession of the mortgaged property until they have paid the mortgage debt or some part of it. *Stonebraker v. Ford*, 532.
7. MORTGAGE; DESCRIPTION OF PROPERTY CONVEYED. Where the recording of a mortgage, as under our statute, takes the place of the actual delivery of the mortgaged property, the mortgage to be effectual, must point out the subject matter of it so that a third person by its aid, together with the aid of such inquiries as the instrument itself suggests, may identify the property conveyed. *Ib.*
8. ———: ———. A mortgage described the property therein conveyed as "forty head of cattle of different ages and sexes, most of them thoroughbreds," and as being on the mortgageor's farm in Pike county. The evidence showed that at the time of the execution of the mortgage, the mortgageor had "forty-five or forty-six head of cattle on his farm of different ages and sizes." The mortgagees brought replevin for sixteen head of said cattle describing them in the petition as "sixteen head of thoroughbred aged cattle;" *Held*, that as to the cattle involved in suit, the mortgage was inoperative, because they were insufficiently described therein. *Ib.*

MORTGAGE: STIPULATIONS: CONTRACT: CONSTRUCTION. *St. Louis Drug Company v. Robinson*, 18.

SEE EQUITY, 3, 4.

INSURANCE, 2, 3, 4, 5.

#### MUNICIPAL CORPORATION.

1. CITY TAXES: RAILROADS: STATUTE: PARTY. Under the act of the general assembly of March 15th, 1875, section 7, (Acts, p. 124,) a city is authorized to sue in its own name for city taxes assessed against railroads. *The City of Kansas v. Hannibal & St. Joseph Railroad Company*, 285.
2. ———: ———: COUNTY CLERK'S CERTIFICATE: EVIDENCE. *Semble*, that the certificates of the clerk of the county court, made in conformity to the provisions of said act, as to the amount of taxes due from a railroad, is *prima facie* evidence of the latter's liability. *Ib.*

3. ———: ———: ———: PRACTICE. It is not necessary to plead, or to file with the petition, said certificates of the county clerk, they being only evidence of the assessment and levy of the taxes, and not the foundation of the suit. *Ib.*
4. ———: COMPROMISE OF: COUNTY COURT NO AUTHORITY TO. A county court has no authority to compromise city taxes, and where a city is forbidden by its charter to so compromise, it cannot ratify an unauthorized compromise made by the county court. *Ib.*
5. TAXATION OF RAILROADS FOR CITY PURPOSES: COUNTY CLERK'S CERTIFICATE: STATUTE. The act of the general assembly of March 24th, 1873 (Acts, p. 119,) relating to taxation of railroads, does not authorize the clerk of the county court to certify the amount due from railroads for city taxes from the certificate of the rate of taxation levied by the city, received by him from the city clerk. The county clerk can make such certificate only from an order of the county court, spread upon its records; otherwise the collection of the tax cannot be enforced. *Ib.*
6. MUNICIPAL CORPORATION: DEED TO ON CONDITION: REVERTER. Where a municipal corporation acquires real estate upon a condition expressed in the deed of the grantor, that within five years it shall erect thereon a certain building proper for municipal purposes, and fails to comply with said condition by not erecting the structure, it must permit the land to return to the grantor, like any other owner of land on condition. *Clarke v. The Inhabitants of the Town of Brookfield*, 503.

SEE ELECTIONS, 1.

## MURDER.

SEE HOMICIDE.

## MUTUAL BENEFIT ASSOCIATION.

SEE INSURANCE, 7.

## NEGLIGENCE.

- 1 NEGLIGENCE: DAMAGE BY FIRE: PRESUMPTIONS. The general rule is, that he who avers negligence must prove it, and the destruction of property by fire does not raise a presumption of negligence, either in the kindling or management of the fire. The case of fires caused by sparks emitted from locomotive engines, is an exception to this rule. *Carton v. Nichols*, 80.
2. ———: ———: BURDEN OF PROOF. A farmer has the right to set out a fire in order to prepare his land for cultivation, and if he does so with the requisite degree of care, and prudently manages the same after it is set out, he cannot be held liable for any accidental or unavoidable injury occasioned thereby; and the burden is on him

who avers that such fire was negligently kindled, or carelessly managed, to prove such negligence or want of care. And the same principle applies to railroad companies in setting out fire upon their right of way to clear it of combustible matter. *Ib.*

3. NEGLIGENCE: VARIANCE. Where the negligence proved is sufficient to support an action, and is of the same character as that alleged, although not proved to the extent alleged, there is no variance. *Werner v. The Citizens' Railway Company*, 368.
4. CONTRIBUTORY NEGLIGENCE, WHEN NO DEFENSE. When the negligence of the defendant, which contributes directly to cause the injury, occurs after the danger, in which the injured party has placed himself by his own negligence, is, or by the exercise of reasonable care, may be discovered by the defendant in time to avert the injury, the defendant is liable, however gross the negligence of the injured party may have been in placing himself in a position of danger. *Ib.*
5. CONTRIBUTORY NEGLIGENCE, WHEN A QUESTION FOR THE JURY. When the facts in evidence as to contributory negligence admit of different constructions or inferences, the question of such contributory negligence is one for the jury. *Scoville v. The Hannibal & St. Joseph Railroad Company*, 434.
6. NEGLIGENCE, WHERE DECEASED IS GUILTY OF CONTRIBUTORY NEGLIGENCE. Where, in an action against a railroad for negligently causing the death of a person, it appears that the deceased was guilty of contributory negligence, the negligence of the defendant, to make the latter liable, must occur after it either knew, or might, by the exercise of ordinary care, have known of the danger of the deceased. *Scoville v. The Hannibal & St. Joseph Railroad Company*, 434.
7. NEGLIGENCE: DEATH OF CHILD: DISCOVERY OF ITS DANGER. In an action for the negligent death of plaintiffs' child, caused by one of defendant's horse railway cars running over it, an instruction is properly refused which exempts the defendant from liability, unless the driver could have stopped the car in time to have prevented the accident after the dangerous situation of the child was discovered. Such instruction is defective in ignoring the question whether or not the driver, in the exercise of ordinary care, could have discovered the child in time to have prevented the accident, for if he could so have discovered the child, the defendant would still be liable. *Welsh v. The Jackson County Horse Railroad Company*, 466.

SEE CARRIERS, 2, 3.

MINOR, 6.

PRACTICE, CIVIL, 10.

#### NEGOTIABLE INSTRUMENT.

SEE PROMISSORY NOTES, 3.

## INDEX.

## NEW TRIAL.

SEE PRACTICE IN SUPREME COURT, 12.

## NONSUIT.

SEE PRACTICE, CIVIL, 2.

## NOTICE.

1. TAX SALE: DEED: NOTICE. A regular notice, published as the law requires, is the very foundation of the collector's authority to sell land for taxes, and the property of the citizen cannot be divested by this kind of sale, unless it appears affirmatively from the form of the collector's deed, that all the requirements of the statute have been strictly pursued. *Spurlock v. Dougherty*, 171.
2. ———: ———: ———. Where the revenue law, (2 Wag. Stat., p. 1196, § 182,) fixes a term of the county court held the first Monday in July, as the term at which such court has jurisdiction to render judgments for taxes, or any subsequent regular term, provided he shall give due notice thereof, (*Ib.*, §§ 183, 188,) and the notice given is to the August adjourned term, such notice does not constitute a compliance with the requirements of the statute, is worthless for the purposes intended, and a deed procured upon such notice is void and inadmissible in evidence. *Ib.*

SEE CONTRACTS, 3.

CONVEYANCES.

DEPOSITIONS, 3

EJECTMENT, 4.

## OFFICES AND OFFICERS.

OFFICE, TRIAL OF RIGHT TO: MANDAMUS: QUO WARRANTO. The right to an office cannot be determined in a proceeding by mandamus to compel the payment of salary to a person claiming such office, or in a proceeding to compel the performance of official duty alleged to be obligatory, by reason of the official character of the claimant. In such cases he who has the better *prima facie* right must be recognized until, by contesting the election, or by proceedings in *quo warranto*, the rights of the parties are finally determined. *The State ex rel. Simmons v. John*, 13.

SEE DEPOSITIONS. 2

JUDICIAL NOTICE, 1.

JUSTICES COURTS, 3.

## PARENT AND CHILD.

**DAMAGES: SUIT BY MINOR, WHEN BROUGHT.** Under Revised Statutes 1879, §§ 2121, 2125, a minor at the time of his parent's death, may sue for the damages allowed by the statute after attaining his majority, provided suit be brought within one year from the time of such death. *Rutter v. The Missouri Pacific Railway Company*, 169.

SEE MINOR, 6.

MISTAKE.

NEGLIGENCE, 7.

## PARTIES.

SEE PLEADING, 5.

PRACTICE, CIVIL, 1.

## PARTNERSHIP.

**PARTNERSHIP.** An agreement between the owner of a farm and another, by which the latter and his wife in conjunction with the owner shall work together on the farm, the proceeds of their joint work and labor to be shared together, is a contract of partnership. It is not a contract for hire and wages, and cannot be sued on as such. *Plummer v. Trost*, 425.

## PERJURY.

SEE PLEADING, CRIMINAL, 5.

## PERSONAL PROPERTY.

SEE MORTGAGES AND DEEDS OF TRUST, 6, 7, 8.

## PLEADING.

1. **PRACTICE: AMENDMENT.** Where the petition asked for the cancellation of a warranty deed because of unsoundness of mind of the grantor, and fraud on the part of the grantee, and after the submission of the cause to the court the petition was amended by inserting the words, "and was intended to be a mortgage or security for debts already paid" for the grantor, the amendment should have been more specific, if it was intended by plaintiff to treat the deed as a valid mortgage, and the defendant should have tried to meet the issues thus tendered. *Ross v. Ross*, 84.



2. ———: PLEADING. In an action of replevin, under the code, a general denial is sufficient to put the plaintiff to proof of title, or right of possession, without any averments of title in defendant, or in a stranger. *Pulliam v. Burlingame*, 111.
3. PLEADING CIVIL: REPLY: OBJECTIONS, WHEN WAIVED. A reply which denies all the material allegations of the answer, without specifying what allegations are denied, is bad pleading, but not a nullity, and if not objected to before trial, will be held sufficient. *Collins v. Trotter*, 275.
4. GUARDIAN, APPOINTMENT OF: PLEADING. In pleading the appointment of a guardian by the probate court, the statute, (R. S. 1879, § 3551,) controls, and the facts conferring jurisdiction need not be more fully stated than therein required. And no objection can afterward be made where it is admitted on the trial that such appointment was duly made, anterior to the trial. *Ib.*
5. PLEADING: PARTIES: INSANE PERSON: GUARDIAN. An insane husband who is under guardianship, cannot be joined in a suit with his wife. It is the duty of the guardian of an insane person to prosecute and defend all actions instituted in behalf of or against his ward. *Hays v. Miller*, 424.
6. NEGLIGENCE: PLEADING: MISJOINDER. A common law action for negligence cannot be joined in the same count with one for statutory negligence. *Kendrick v. The Chicago & Alton Railroad Company*, 521.
7. RAILROAD: KILLING STOCK: PLEADING: STATEMENT. In an action against a railroad company, under the statute, for double damages for killing stock, the statement is sufficient after verdict in that regard if enough is contained therein from which it may be reasonably inferred that the animal escaped upon the right of way where the road had neglected to fence. *Busby v. The St. Louis, Kansas City & Northern Railway Company*, 43.

SEE RAILROADS, 8.

TAXES, 13.

#### PLEADING, CRIMINAL.

1. PLEADING, CRIMINAL: INFORMATION. An information which charges an offense in the language of the statute creating it, is sufficient. *The State v. Burr*, 108; *The State v. Anderson*, 78.
2. ———: INDICTMENT. An indictment under Revised Statutes 1879, section 5442, which charges certain persons with having unlawfully granted a dramshop license, and that they were then judges of the county court, is insufficient. It should aver that the license was granted by them as judges of the county court, and that the act was done willfully, knowingly, or from an improper motive. *The State v. Kite*, 97.

3. ———: INDICTMENT. An indictment for murder which avers that the striking and wounding were in the heart, and that the mortal wound, so given, was through the body, is not repugnant, and the wound need not be described. *The State v. Henson*, 384.
4. INDICTMENT: PURPORT: TENOR. Although the statement of the purport of an instrument be repugnant, yet, if the instrument is set out according to its tenor, the indictment will be sufficient under the statute. R. S. 1879, § 1821. *State v. Pullens*, 387.
5. ———: FORGERY: BANKING INSTITUTION. An indictment which charges the forgery of a promissory note "payable to the order of the People's Savings Bank" at "the banking house of the People's Savings Bank," sufficiently charges that the latter was a banking institution. *Ib.*
6. PLEADING, CRIMINAL: INDICTMENT. An indictment which sets forth all the facts necessary to constitute an offense, as created and defined by statute, is sufficient. *The State v. Madden*, 421.
7. ———: INDICTMENT FOR PERJURY. An indictment for perjury which names the cause in which the alleged perjury was committed, and the court in which the same was being tried, states the materiality of the issue so that the court can determine it, sets out the facts alleged to have been sworn to, negatives their truth and properly assigns perjury upon them, is sufficient. *The State v. Cave*, 450.

SEE CRIMINAL LAW, 22.

JUDICIAL NOTICE, 1.

POSSESSION.

TITLE: POSSESSION. Actual possession is evidence of title against any one who does not show a better title. *Weeks v. Etter*, 375.

SEE CONVEYANCES.

COVENANTS OF WARRANTY, 1.

CRIMINAL LAW, 11.

DEEDS, 2.

EJECTMENT, 3.

LAND AND LAND TITLES, 2.

MORTGAGES AND DEEDS OF TRUST, 6.

REPLEVIN, 4.

TRESPASS, 1, 2

## PRACTICE, CIVIL.

1. **TRANSFER OF INTEREST IN SUIT: SUBSTITUTION: STATUTE.** Under Revised Statutes 1879, section 3671, a party who has transferred his interest in a pending suit, and presents the petition of his transferee, asking the substitution of the latter in his stead as said party, is entitled to have such substitution made, and if the trial court refuses to order the substitution, the record not disclosing the ground of its action, the cause will be reversed. *Childs v. Thompson*, 337.
2. **JUSTICES OF THE PEACE, AUTHORITY OF: NONSUIT, MOTION TO SET ASIDE.** A justice of the peace has only such authority as the statute gives him. He has no general power to set aside verdicts, and can only set aside nonsuits when entered on account of the absence of the plaintiff. Where the plaintiff is present when the nonsuit is entered, he has the right to appeal without filing a motion to set it aside. *Weeks v. Etter*, 375.
3. **TAXES: PETITION: DESCRIPTION.** Where land, against which the lien for taxes is sought to be enforced, is specifically described in the petition and tax bill, and the tax bill and other evidence identify it, so there can be no mistake, the judgment of the court finding the tax to be due on such land, will be affirmed. *State ex rel. Hall v. Cowgill*, 381.
4. **SHERIFF: INDEMNIFYING BOND: CLAIMANT OF, PROPERTY WHEN NOT LIMITED TO.** In the absence of statutory prohibition, the claimant of property levied on by a sheriff, and as to which an indemnifying bond has been given the officer, is not restricted to his remedy on the bond, but may sue the sheriff for the trespass or conversion. *The State ex rel. Mastin v. McBride*, 349.
5. **STATUTE, CONSTRUCTION OF.** The provisions of the Revised Statutes of 1879, do not prohibit such common law action against the sheriff for trespass or conversion, where an indemnifying bond has been given. *Ib.*
6. **PRACTICE: DECREE: PRAYER FOR TITLE.** A decree should conform to the pleadings and evidence in a cause.  
In a suit by bill in equity praying that the title to certain lots, conveyed to defendant by sheriff's and trustee's deeds, be vested in plaintiff, and that defendant be required to account for rents received by him thereon, it is error to enter against defendant a general personal money judgment. *Dougherty v. Adkins*, 411.
7. **REPLEVIN: MARRIED WOMAN.** A married woman cannot maintain an action of replevin, for the recovery of possession of personal property, in her own name. *Hays v. Miller*, 424.
8. **PRACTICE, CIVIL: DECLARATIONS OF LAW.** The giving of an ambiguous declaration of law, in a trial before the court, is not necessarily ground for a reversal. *Methudy v. Ross*, 481.
9. ———: ———. In a trial before the court, parties should ask for declarations of law from which it can be determined what the court held as to the law, and what it found as to the facts. *Ib.*

10. NEGLIGENCE: PLEADING: MISJOINDER. A common law action for negligence cannot be joined in the same count with one for statutory negligence. *Kendrick v. The Chicago & Alton Railroad Company*, 521.
11. PRACTICE: FAILURE TO FILE REPLY. Where the failure to file a reply is the result of accident or inadvertence, the court may permit it to be filed after the jury is sworn for the trial of the cause. *Blondeau v. Sheridan*, 545.
12. PRACTICE: SEVERAL COUNTS: ELECTION. A party cannot complain of having been compelled to elect to stand on one of two counts in his petition, when the one on which he did not elect to stand failed to state a cause of action. *MacLeod v. Skiles*, 595.
13. COVENANTS RUNNING WITH LAND: TENANTS IN COMMON. Tenants in common can maintain a joint action for breaches of covenants running with the land. *Blondeau v. Sheridan*, 545.

SEE DEEDS, 6, 7.

REPLEVIN, 2.

TAXES, 8.

#### PRACTICE, CRIMINAL.

1. PRACTICE, CRIMINAL. EVIDENCE: DEMURRER. In a prosecution under Revised Statutes 1879, section 5472, it devolves upon the State to show that the quantity of liquor sold is less than one gallon, and where it fails to do so, a demurrer should be sustained at the close of the evidence for the State; but, if the defendant, in his own testimony, supplies this defect, he will not be entitled to a reversal for the error of the court in refusing his demurrer to the evidence. *The State v. Anderson*, 78.
2. ———: INSTRUCTIONS. The giving of an instruction authorizing a greater punishment than allowed by law, will not constitute reversible error where the jury assess the minimum punishment allowed by law. *The State v. Burr*, 108.
3. PLEADING, CRIMINAL: INDICTMENT. A description of money in an indictment for robbery, which describes it as "\$500 of the lawful money of the United States of the value of \$500," is, under the statute, (R. S. 1879, § 1817,) sufficient. *The State v. Burnett*, 119.
4. ———: ———: CLERICAL MISTAKE. It is a mere clerical mistake for an indictment found in May, 1883, to allege that the robbery charged therein was committed in December, 1883. The mistake is cured by the statute, (R. S. 1879, § 1821,) and should be disregarded. *Ib.*
5. PRACTICE CRIMINAL: OBJECTION TO EVIDENCE EXCEPTIONS. Objection should be made and exceptions saved to the introduction of improper evidence at the time of its admission. It is too late to do so for the first time in the motion for new trial. *Ib.*

6. ———: CROSS-EXAMINATION. It is error to cross-examine a defendant, testifying in his own behalf in a criminal cause, as to matters not testified upon in his examination in chief.  
The cross-examination in this cause held, in no material particular to extend beyond the examination in chief. *The State v. Douglass*, 231.
7. ———: ABSENT WITNESS: CONTINUANCE. Where the affidavit for a continuance, by the defendant in a criminal case, shows on its face that subpoenas had been issued and returned not served on the witnesses whose absence constituted the basis of the application, and the prosecuting attorney having agreed that the facts set out in the affidavit should be read as the testimony of such witnesses, it was not error to deny the continuance.  
The continuance might well have been refused upon the further ground that the affidavit failed to state where the absent witnesses resided, or might be found, as required by statute. R. S. 1879, § 1884. *The State v. Henson*, 384.
- 8 CRIMINAL LAW: INDICTMENT: PURPORT: TENOR. It is not required, either at common law, or by statute, that both the purport and tenor of an instrument charged to have been forged, should be set out in the indictment. It is sufficient to describe it by its purport, (R. S. 1879 § 1814,) or the instrument may be set out according to its tenor only. *The State v. Pullens*, 387.
9. ———: INSTRUCTION. An instruction need not be as technical as an indictment, and it is sufficient to charge that, if defendant falsely made and forged the note in question, with intent to injure and defraud, the jury should convict. It need not declare that the jury, in order to convict, must find that defendant falsely, fraudulently and feloniously made and forged the instrument. *Ib.*
10. ———: MATTERS OF EXCEPTION. The action of the trial court in overruling challenges of jurors, and improper remarks of counsel, are matters of exception, and can be preserved only in the bill of exceptions. *The State v. Hayes*, 574.
11. ———: ARGUMENT OF COUNSEL, ORDER OF. It is a compliance with the requirements of Revised Statutes 1879, section 1908, for counsel for the State to open the argument in a criminal cause, followed by counsel for the defense, who is in turn followed by counsel for the State, thus alternating throughout, counsel for the State closing. *The State v. Collins*, 652.
12. ———: JURY, SEPARATION OF. Under Revised Statutes 1879, section 1909, the court cannot, in the trial of a capital case, allow the jury to separate, nor can the sheriff nor his bailiffs permit it. Where such separation takes place the judgment will be reversed, although it does not appear that any juror was approached upon the subject of the trial, or that there was any ground of suspicion that they were moved by outside influences. NORTON, J., dissenting. *Ib.*
13. ———: INSTRUCTIONS. It is not error to refuse an instruction for murder in the second degree, where the evidence does not show the commission of that grade of offense. *Ib.*



## PRACTICE IN SUPREME COURT.

1. PRACTICE IN SUPREME COURT: INSTRUCTIONS, MARKS ON MARGIN OF. Writing on the margin of instructions the words "given" and "refused," is no entry, and does not indicate that the instructions were given or refused. *The State v. Johnson*, 60.
2. CRIMINAL LAW: PRACTICE IN SUPREME COURT. The jury are the judges of the credibility of the witnesses and the weight of the evidence, and, in the absence of glaring indications of a disregard of the evidence by them, the Supreme Court will not interfere with their finding. *Ib.*
3. PRACTICE IN SUPREME COURT: INSTRUCTIONS: EVIDENCE. This court will not review instructions not contained in the bill of exceptions, and will not pass upon the weight of the evidence. *Montgomery v. Harker*.
4. PRACTICE, CIVIL: JUDGMENT: EVIDENCE. If there is no evidence to support a verdict, the judgment will be reversed. *Hacker v. Brown*, 68.
5. PRACTICE IN SUPREME COURT: INSTRUCTIONS. Where it is not alleged in the motion for new trial that the trial court misdirected the jury, the Supreme Court will not review the instructions. *The State v. Burnett*, 119.
6. EQUITY: FINDING OF FACTS BY LOWER COURT, WHEN SUPREME COURT WILL NOT DISTURB IT. In an equity case where the trial court has the witnesses personally before it, and there is abundant evidence to sustain its finding of facts, the Supreme Court will not interfere and reverse such finding, unless it is clear it should have been otherwise. *Judy v. The Farmers & Traders' Bank*, 404.
7. PRACTICE IN SUPREME COURT: WEIGHT OF EVIDENCE. The Supreme Court will not interfere with the authority of the trial court to weigh the evidence, and will not reverse a judgment for supposed errors in this respect. *Crane v. Timberlake*, 431.
8. ———: INSTRUCTIONS. Where there is any thing in the pleadings, the testimony or instructions to warrant the conclusion that but for the faulty phraseology of an instruction complained of, the jury would not have found a verdict, the Supreme Court will reverse the judgment, but otherwise, when from all of the instructions the jury could not have misconstrued the one complained of. *Cooper v. Johnson*, 483.
9. VERDICT: NO EVIDENCE TO SUPPORT. Where there is no evidence to support a verdict, returned by the jury, on a count in the petition for the negligent killing of one of plaintiff's hogs, the judgment will be reversed as to such count. *Kendrick v. The Chicago & Alton Railroad Company*, 521.
10. PRACTICE IN SUPREME COURT: BILL OF EXCEPTIONS. Where the record proper, regardless of the bill of exceptions and motion to set aside the judgment, shows that the judgment against the sureties on the

penal bond is greater than the penalty, the judgment will be reversed. *Showles v. Freeman*, 540.

11. ———: LOST INSTRUCTION. The Supreme Court will not reverse a judgment because a refused instruction asked on behalf of the defendant is lost or mislaid, and, therefore, omitted from the transcript, it appearing that the other instructions given in the cause, and contained in the transcript, fully covered the law of the case. *The State v. Hayes*, 574.
12. MOTION FOR NEW TRIAL: EXCEPTIONS: PRACTICE IN SUPREME COURT. Where a party fails to except to the action of the court in overruling his motion for new trial, he will be held to have acquiesced therein, and the Supreme Court will not consider matters called to the attention of the trial court by such motion, but will affirm the judgment if it be supported by the pleadings. *McIrvine v. Thompson*, 647.
13. PRACTICE IN SUPREME COURT: VERDICT AGAINST WEIGHT OF EVIDENCE. The Supreme Court will not reverse a judgment because the verdict is against the seeming weight of the evidence, where there is evidence tending to support it. *Huckshorn v. Hartwig*, 648.
14. ———: PRESUMPTION. In the absence of affirmative evidence to the contrary, the Supreme Court will presume in favor of the decision of the trial court, which has admitted a patent in evidence after inspection, that the certificate as it then was disclosed the requisite authentication. *Holton v. Kemp*, 661.

SEE EQUITY, 7.

JUDGMENTS, 1.

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#### PRESUMPTIONS.

SEE CONTRACTS, 5.

CRIMINAL LAW, 11.

DEEDS, 6.

EVIDENCE, 13.

HUSBAND AND WIFE, 3.

JURY, 2.

NEGLIGENCE, 2.

PRACTICE IN SUPREME COURT, 14.

## PRINCIPAL AND AGENT.

1. CONTRACT: CONSTRUCTION: CUSTOM. Where contractors undertook to do the masonry of a building according to plans and specifications for the same, for the sum of \$2 in addition to the price of rock per perch, and the evidence showed a custom prevailing, in ascertaining how much masonry had been completed so as to pay the demand of a mason for laying rock in a wall, to count corners twice, each corner constituting a part of two intersecting walls, also all openings for doors and windows as if they were solid matter; *Held*, the contractors were entitled, under their contract, to a measurement in accordance with said custom. *Fitzsimmons v. The Academy of Christian Brothers*, 37.
2. CORPORATION: AGENT: RATIFICATION. Where a person is employed for a corporation, by one assuming to act in its behalf, and renders service according to agreement, with the knowledge of its officers and without notice that the contract is not recognized, as valid and binding, such corporation will be held to have sanctioned and ratified the contract, and be compelled to pay for the service. *Holmes v. The Board of Trade of Kansas City*, 137.
2. CRIMINAL LAW: SELLING INTOXICATING LIQUOR ON SUNDAY: PRINCIPAL AND AGENT. A principal will be held criminally liable for a sale of intoxicating liquor by his agent, unless he shows that such sale was not authorized by him, and was forbidden. *The State v. Heckler*, 417.

## PRINCIPAL AND SURETY.

1. SURETIES FOR PAYMENT OF RENT: CHANGE OF CONTRACT: RELEASE. Sureties who contract for the payment of rent by two lessees jointly, are discharged by an agreement by the lessor, without their consent, that one of the lessees may retire from the leased premises and that the lessor will look to the other lessee for the rent. *Prior v. Kiso*, 241.
2. LESSOR RECEIVING BACK MATERIAL PART OF PREMISES: SURETIES. And if the lessor, without the consent of such sureties, receives back from the lessees a material part of the leased premises, the sureties will be discharged. *Ib.*
3. BANKRUPTCY PROCEEDINGS, DISCHARGE IN: ALLOWANCE TO SURETY. Where there is no general discharge in bankruptcy proceedings, the statutory provision limiting the allowance to a surety, does not apply. *Thomas v. Liebke*, 675.
4. PRINCIPAL: SURETY: RECOURSE. To deprive a surety who has paid his principal's debt of a recourse upon the principal, the provision must appear in distinct terms, and must be strictly construed. *Ib.*

SEE MORTGAGES AND DEEDS OF TRUST, 6.

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## PRIORITY.

SEE EQUITY, 4.

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INSANE PERSONS, 8.

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## PROMISSORY NOTES.

1. PROMISSORY NOTE: FAILURE OF CONSIDERATION. Recovery cannot be had upon a promissory note when the consideration therefor has wholly failed. *Hacker v. Brown*, 68.
2. PROMISSORY NOTE, WHEN PAYABLE. A promissory note made payable on the "first day of March," without naming the year, is regarded in the same light as where the time of payment is left blank, or no time is specified, and is payable on demand. And suit brought on such note is a sufficient demand. *Collins v. Trotter*, 275.
3. NEGOTIABLE NOTE: CONTEMPORANEOUS ORAL CONTRACT. An accommodation indorser of a negotiable note who, after demand, protest and notice pays it to the holder, cannot recover back the sum so paid by way of damages upon an oral contract, contemporaneous with the indorsement, that if on the maturity of the note the maker would execute a new one secured by a deed of trust on certain land, the note indorsed was not to be paid, but should be surrendered for cancellation. *Gardner v. Mathews*, 627.
4. INTEREST: RATE AFTER MATURITY. Where a note stipulates simply for the payment of interest at ten per cent from date, it will, also, bear the same rate after maturity. *Borders v. Barber*, 636.
5. NEGOTIABLE NOTE: MAKER: PAYEE: INDORSEE: COMPOSITION. An accommodation maker of a negotiable note is not barred of his remedy against the payee and indorsee, by reason of a composition with the latter's creditors to which the maker of the note was not a party. *Thomas v. Liebke*, 675.
6. ———: CLAIM OF MAKER. In such a case the claim of the maker is not a claim upon the note, and is distinct from the claim proved up in the bankruptcy proceedings by the holder of the note. *Ib.*
7. ———: ———: PAYMENT. It is immaterial that the maker's claim was not matured by a payment of the note at the date of the composition agreement. *Ib.*

## QUO WARRANTS.

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## RAILROADS.

1. RAILROAD: KILLING STOCK: PLEADING: STATEMENT. In an action against a railroad company, under the statute, for double damages for killing stock, the statement is sufficient after verdict in that regard if enough is contained therein from which it may be reasonably inferred that the animal escaped upon the right of way where the road had neglected to fence. *Busby v. The St. Louis, Kansas City & Northern Railway Company*, 43.
2. DEFECTIVE FENCE: WANT OF TIME TO REPAIR MATTER OF DEFENSE. The fact that a sufficient length of time had not elapsed, after the fence became defective, to allow the railroad opportunity to repair, is a matter of defense for the road to invoke. *Ib.*
3. AGREEMENT BETWEEN RAILROAD AND ADJACENT LAND OWNER AS TO FENCE: LAND OWNER JOINING HIS FENCE TO COMPANY'S. The duty to fence is a statutory one, imposed on the railroads, especially toward the adjacent land owner. Such owner and the railroad may agree as between themselves to dispense with such fence, or that the owner should build and maintain it, or to maintain it in common, and in such cases the land owner cannot maintain an action against the railroad for any injury resulting from the absence of or bad condition of the fence, but the fact that the fence belonged to the company, and the fence inclosing the land owner's field was joined to the former's fence with its consent, creates no legal implication that such owner of the land assumed any obligation to aid in keeping up the fence. *Ib.*
4. FOREIGN ROAD. A railroad company incorporated and existing under the laws of an adjoining state, is empowered by statute, (R. S. 1879, § 790; Laws 1870, p. 90, § 2,) to obtain, in this State, a right of way by condemnation proceedings. *Gray v. St. Louis & San Francisco Railway Company*, 126.
5. RAILROADS: DUTY TO FENCE: DAMAGES: INSTRUCTIONS. An instruction which declares that it is the duty of a railroad company to erect and maintain lawful fences with gates therein, as required by statute, and until it does so, it is liable in double the amount of damages done to stock by its engines and cars, is too broad and general. It should be qualified by the further statement that if the injury was occasioned by such failure to fence, the company would be liable. *Ridenore v. Wabash, St. Louis & Pacific Railway Company*, 227.
6. ———: INJURY TO STOCK: DAMAGES. A recovery cannot be had for injury to stock done by the engine and cars of a railroad company where it has erected and maintained the fences and gates, required by law, and where the evidence fails to show that the gate through which the stock entered upon the track was left open, or that, if it was, the company could, by the exercise of reasonable diligence,



have known it, or that left open and the company knew it, a reasonable time had elapsed, after it acquired such knowledge, in which to close it. *Ib.*

7. NEGLIGENCE, WHERE DECEASED IS GUILTY OF CONTRIBUTORY NEGLIGENCE. Where, in an action against a railroad for negligently causing the death of a person, it appears that the deceased was guilty of contributory negligence, the negligence of the defendant, to make the latter liable, must occur after it either knew, or might, by the exercise of ordinary care, have known of the danger of the deceased. *Scoville v. The Hannibal & St. Joseph Railroad Company*, 434.
8. RAILROADS: KILLING STOCK: STATEMENT. A statement which alleges that the cow was killed at a point where there was no fence, and where by law the railroad company was bound to fence, and that by reason of such failure to fence the cow strayed upon the track and was killed, is sufficient. *Moore v. Wabash, St. Louis & Pacific Railway Company*, 499.
9. ———: ———: DAMAGES. A railroad company, under the double damage act, (R. S. 1879, § 809,) is not liable to the owner of stock killed or injured on its track, unless it got upon the track at a place where the company is required by law to fence, regardless of where the stock may have been killed or injured. *Ib.*
10. ———: KILLING STOCK: FAILURE TO RING BELL AT PUBLIC CROSSING. In an action founded on Revised Statutes, section 806, against a railroad for killing plaintiff's hog at a public crossing, caused by neglect to ring the bell or to blow the whistle of its locomotive, it not appearing that the hog was fettered or hindered so as to prevent its escape from the track had the signals been given, it is proper for the trial court to instruct the jury to find whether the killing was caused by the alleged neglect to give the signals. *Kendrick v. The Chicago & Alton Railroad Company*, 521.
11. ———: DOUBLE DAMAGE ACT: CONSTRUCTION. Section 809, Revised Statutes 1879, subjects a railroad to the payment of double damage for hogs which escape upon its track by reason of its neglect to fence and in consequence are killed by its engines and cars. *Henderson v. The Wabash, St. Louis & Pacific Railway Company*, 605.

#### SEE CONDEMNATION PROCEEDINGS.

NEGLIGENCE, 2.

TAXES, 6, 7, 8, 11, 14.

#### RATIFICATION.

SEE CORPORATIONS, 3.

#### RENTS.

SEE LEASE, 5.

## RENTS AND PROFITS.

SEE EJECTMENT, 4.

## REPLEVIN.

1. **REPLEVIN: VALUE: DAMAGES.** In replevin there is a distinction between the value of the property to be found, and the amount of damages to be assessed, and they must be found separately. The value of the property at the time of the assessment is the value to be found by the jury, and any depreciation occasioned by the taking and detention, should be considered in estimating the damages; but in such case counsel's fees are not recoverable by way of damages. *Mix v. Kepner*, 93.
2. ———: **ACTION BY JOINT OWNER.** One joint owner of personal property cannot maintain an action of replevin against his joint tenant, and where the case develops these facts alone, the plaintiff cannot recover.
3. ———: **PLEADING.** In an action of replevin, under the code, a general denial is sufficient to put the plaintiff to proof of title, or right of possession, without any averments of title in defendant, or in a stranger. *Pulliam v. Burlingame*, 111.
4. ———: **FRAUDULENT SALE: POSSESSION.** Defendant, as sheriff levied an attachment upon a number of sheep in favor of an execution creditor. Plaintiff claimed them by virtue of a bill of sale from the execution debtor, and brought an action of replevin against defendant for their possession. The consideration of the sale to plaintiff was an antecedent debt, and the sheep in question had never been separated from other sheep of the vendor, nor taken from the latter's possession; *Held*, that the sale was void as to the creditors of the vendor, and that plaintiff was not entitled to their possession. R. S. 1879, § 2505. *Crane v. Timberlake*, 431.

SEE HUSBAND AND WIFE, 2.

## REVERTER.

SEE MUNICIPAL CORPORATIONS, 6.

## ROBBERY.

SEE PRACTICE CRIMINAL, 3.

## ST. LOUIS CRIMINAL COURT.

ST. LOUIS CRIMINAL COURT: CHANGES OF VENUE: STATUTE. Section 19, page 1509 of the Revised Statutes of 1879, relating to applica-

tions to a judge of the circuit court of St. Louis in the matter of changes of venue from the St. Louis Criminal Court, and to the mode of procuring such changes of venue, was wholly repealed by section 1877 of Revised Statutes of 1879, and applications for changes of venue from said St. Louis criminal court are now governed by the general law of the State. Overruling *State v. Kring*, 74 Mo. 612. HENRY, J., dissenting. *The State v. Hayes*, 574.

#### SALE.

**LIEN, SALE TO SATISFY: SUBROGATION.** Where one has become a purchaser in good faith, under a sale which proves to be void for irregularity, and the purchase money has been applied to a satisfaction of the lien for which the sale was ordered, the purchaser becomes subrogated to the rights of the lien-holder to the extent of his payment, but when the proceedings are regular in all respects, and the decree is effectual in subjecting to its behests the interests and estates of all parties before the court, such subrogation, especially in the absence of fraud, will not be made. *Burden v. Johnson*, 318.

SEE ADMINISTRATION, 6.

EQUITY, 1, 3.

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INSANE PERSONS.

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MORTGAGES AND DEEDS OF TRUST, 1.

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SEE TAXES, 14.

SCHOOL TAX.

SEE TAXES, 14.

SEDUCTION.

SEE CRIMINAL LAW.

SHERIFF

SEE INDEMNIFYING BOND, 1, 2.

SIGNIFICATION OF TERMS.

- "PURPORT;" "TENOR." See *State v. Pullens*, 387.  
 "DRAMSHOP KEEPER." See *State v. Heckler*, 417.  
 "COURTENANCE." See *Cooper v. Johnson*, 483.

SUBROGATION.

SEE LIEN, 2.

SUBSTITUTION.

SEE PRACTICE, CIVIL, 1.

TAXES.

1. TAXES, SUIT TO ENFORCE COLLECTION: EXECUTION, MOTION TO QUASH BY STRANGER. A stranger to the action, in a suit to enforce the lien of the State for taxes against land, cannot come into court and move to quash the execution and levy upon the ground that he is the true owner of the land, and has not been served with notice of the pendency of the suit. The title to real estate cannot be tried in such manner. The parties are entitled to a jury and time to prepare for trial. If such stranger was not a party defendant in the action to enforce the tax lien, his rights of property in the land were in no way affected thereby. *The State ex rel. Carter v. Clymer*, 122.
2. TAX DEED: EVIDENCE. A tax deed made by the county treasurer as *ex-officio* collector, is void and not admissible in evidence, in the absence of proof that the office of collector has devolved upon the treasurer by reason of the adoption of township organization by the county. *Spurlock v. Dougherty*, 171.
3. TAX SALE: DEED: NOTICE. A regular notice, published as the law requires, is the very foundation of the collector's authority to sell land for taxes, and the property of the citizen cannot be divested by this kind of sale, unless it appears affirmatively from the form of the collector's deed, that all the requirements of the statute have been strictly pursued. *Ib.*
4. — : — : —. Where the revenue law, (2 Wag. Stat., p. 1196, § 182,) fixes a term of the county court held the first Monday in July, as the term at which such court has jurisdiction to render judgments for taxes, or any subsequent regular term, provided he shall give due notice thereof, (*Ib.*, §§ 183, 188,) and the notice given is to the August adjourned term, such notice does not constitute a compliance with the requirements of the statute, is worthless for the purposes intended, and a deed procured upon such notice is void and inadmissible in evidence. *Ib.*
5. TAXES: SUIT TO AVOID SALE: LIMITATION. The statute requiring a

suit for the recovery of lands sold for taxes, or to defeat or avoid the sale, to be brought within three years from the time of recording the tax deed, (2 Wag. Stat., p. 1207, § 221,) does not apply where the owner is in possession. *Ib.*

6. CITY TAXES: RAILROADS: STATUTE: PARTY. Under the act of the general assembly of March 15th, 1875, section 7, (Acts, p. 124,) a city is authorized to sue in its own name for city taxes assessed against railroads. *The City of Kansas v. Hannibal & St. Joseph Railroad Company*, 285.
7. ———: ———: COUNTY CLERK'S CERTIFICATE: EVIDENCE. *Semble*, that the certificates of the clerk of the county court, made in conformity to the provisions of said act, as to the amount of taxes due from a railroad, is *prima facie* evidence of the latter's liability. *Ib.*
8. ———: ———: ———: PRACTICE. It is not necessary to plead, or to file with the petition, said certificates of the county clerk, they being only evidence of the assessment and levy of the taxes, and not the foundation of the suit. *Ib.*
9. ———: COMPROMISE OF: COUNTY COURT NO AUTHORITY TO. A county court has no authority to compromise city taxes, and where a city is forbidden by its charter to so compromise, it cannot ratify an unauthorized compromise made by the county court. *Ib.*
10. PROPERTY ESCAPING TAXATION: LIABILITY TO IN HANDS OF SUBSEQUENT PURCHASER. Property subject to and which has escaped taxation through the mistake or inadvertence of the officers whose duty it was to assess, levy and collect the same, is liable to taxation in the hands of a subsequent purchaser for the years it has so escaped. *Ib.*
11. TAXATION OF RAILROADS FOR CITY PURPOSES: COUNTY CLERK'S CERTIFICATE: STATUTE. The act of the general assembly of March 24th, 1873 (Acts, p. 119,) relating to taxation of railroads, does not authorize the clerk of the county court to certify the amount due from railroads for city taxes from the certificate of the rate of taxation levied by the city, received by him from the city clerk. The county clerk can make such certificate only from an order of the county court, spread upon its records; otherwise the collection of the tax cannot be enforced. *Ib.*
12. COVENANTS AGAINST INCUMBRANCES: FOUNDATION OF SUIT: RECOVERY OF TAXES. The foundation of an action for the recovery of taxes paid by the grantee under a deed containing covenants against incumbrances, is proof of such a deed, and the existence of the taxes as an incumbrance, and their payment by the grantee. Without proof of these, such suit cannot be maintained. *Patterson v. Yancy*, 379.
13. TAXES: PETITION: DESCRIPTION. Where land, against which the lien for taxes is sought to be enforced, is specifically described in the petition and tax bill, and the tax bill and other evidence identify it, so there can be no mistake, the judgment of the court finding the tax to be due on such land, will be affirmed. *State ex rel. Hall v. Cowgill*, 381.



14. **SCHOOL TAX: RAILROADS.** Under the act of 1877, (Laws 1877, § 1, p. 365, Laws 1875, § 1, p. 129, amended,) the fund arising from the taxation of railroads goes exclusively to the school districts in the townships only when such townships have made valid subscriptions to the railroads. When no such subscriptions have been made by the townships, the fund is distributed ratably among all the districts of the county, except that the taxes arising from land, depots, workshops and other buildings, belonging to the railroads, shall go to the districts in which such property is situated. *School District No. 1 v. Rhoads*, 473.
15. **LIMITATIONS, STATUTE OF: BACK TAXES.** The statute of limitations does not run against a demand of the State for delinquent taxes. *The State ex rel. Ellison v. Piland*; 519.

TENANTS.

SEE LANDLORD AND TENANT, 1.

TENANTS IN COMMON.

SEE LAND AND LAND TITLES, 4.

TITLE.

**POSSESSION.** Actual possession is evidence of title against any one who does not show a better title. *Weeks v. Etter*, 375.

SEE INSTRUCTIONS, 3.

TOWNSHIP ORGANIZATION.

SEE JUDICIAL NOTICE, 2.

TRESPASS.

1. **POSSESSION.** Possession alone is sufficient to maintain an action of trespass as against a stranger; and any possession is legal possession against a wrong-doer. *Watts v. Loomis*, 236.
2. **TRESPASS: EQUITABLE TITLE: PRIOR POSSESSION.** When plaintiffs had been in possession of the surface of land, under color of title, for more than ten years before defendants, under color of title, entered into possession of the mines below the surface, both claiming title from a common source, and so continuing in possession to the time of bringing suit, the deed from the common source of title to plaintiffs' grantor being prior, but defective in form, though valid as a contract to convey, the purchase money having been paid; *Held*, that plaintiffs being the equitable owners and having prior rightful possession, can, under the facts of this case, maintain an action of trespass against defendants. *Ib.*

3. **TRESPASS, WHO ARE PRINCIPALS IN.** Any person who is present at the commission of a trespass, encouraging or inciting the same by words, gestures, looks or signs, or who, in any way, or by any means countenances or approves the same, is, in law, deemed to be an aider and abettor, and liable as a principal. *Cooper v. Johnson*, 483.

SEE INDEMNIFYING BOND, 1, 2.

#### TRUSTS AND TRUSTEES.

1. **EQUITY: ACCOUNTING: INTEREST.** While in equity there never was an absolute rule governing the rate of interest, or the liability to pay compound interest, yet the following may be stated as underlying principles with which all rules and orders of accounting should conform as near as the circumstances of the case will permit: 1st, A trustee is accountable for all interest or profits actually received by him from the trust fund, whether used in his private business or otherwise employed by him. Under no circumstances will he be permitted to retain any benefit or advantage from the trust fund, except his compensation or commissions. 2nd, He is, at all events, accountable for such interest or profits as he might have obtained by the exercise of reasonable skill and exertion in the management of the fund whenever the character of his trust, or the relation which he holds to the fund requires him to make it productive. In all such cases he is, at least, accountable for such gains and profits, although the actual gains and profits may be less. All orders for periodical rests and for compounding interest should be adopted, not for punishing the delinquent trustee, but for the purpose of attaining the actual or presumed gains, and to make certain that nothing of profit or advantage remains to the trustee, except, perhaps, his commissions or compensation. *Cruce v. Cruce*, 676.
2. **TRUSTEE: ACTUAL GAINS FROM TRUST FUND: BURDEN OF ACCOUNTING FOR: TRUSTEE'S SILENCE.** The burden of accounting for the actual gains and profits rests upon the trustee. If he fails or refuses to furnish evidence of them, he invites the rule which shall most nearly approximate his actual gains and leave no advantage or benefit to him by reason of his silence or refusal. When, notwithstanding his failure to disclose his profits, they are in fact known to the court by means of other evidence before it, the order of accounting should be framed with reference to approximating such gains, unless they should be less than a prudent management of the funds should have produced. *Ib.*
3. **USE OF TRUST FUND BY TRUSTEE: RATE OF INTEREST CHARGEABLE AGAINST HIM.** Where a trustee uses in his private business the trust fund, he is *prima facie* liable, at least, for the legal rate of interest for the use of money, that is that rate which the law attributes to contracts in the absence of stipulation on the subject. Where it appears in proof that the higher rate could easily have been obtained, the trustee should be accountable for such higher rate, always, of course, within the rates permitted by law. *Ib.*
4. **The proper method for calculating interest, upon the accounts of the executor in this case, stated.** *Ib.*

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EQUITY, 3.

INSURANCE.

ULTRA VIRES.

SEE CORPORATIONS, 1,

VALUE.

SEE REPLEVIN, 1.

VARIANCE.

NEGLECTANCE: VARIANCE. Where the negligence proved is sufficient to support an action, and is of the same character as that alleged, although not proved to the extent alleged, there is no variance. *Werner v. The Citizens' Railway Company*, 368.

SEE DEPOSITIONS, 3.

VENUE.

- 1 VENUE, CHANGE OF: SUFFICIENCY OF APPLICATION. An application for a change of venue verified by the affidavit of the applicant, is sufficient to form a *prima facie* basis for the granting of the order for the change, and the applicant is not called upon to establish by evidence *aliunde* the facts sworn to in the affidavit. *Mix v. Kepner*, 93.
2. CHANGE OF VENUE: DISCRETION OF TRIAL COURT In the absence of evidence in the record showing, or tending to show, that the trial court abused its discretion in denying an application for a change of venue, the Supreme Court will not disturb its ruling. *The State v. Henson*, 384.

SEE CONSTITUTIONAL LAW, 4.

ST. LOUIS CRIMINAL COURT.

VERDICT.

SEE PRACTICE IN SUPREME COURT, 9.

VESTED RIGHTS.

SEE CONDEMNATION PROCEEDINGS, 3, 4.

## WAIVER.

**GUARDIAN OF INSANE PERSON: WAIVER BY.** The general guardian of an insane person, unlike the guardian *ad litem* of an infant, can act in regard to his ward's interest like an ordinary litigant, and waive objections to the admission of testimony, the same as if acting in his own right. *SHERWOOD, J.*, dissenting. *Collins v. Trotter*, 275.

SEE INSANE PERSONS, 3.

LEASE, 4.

PLEADING, 3.

## WAREHOUSE.

**WAREHOUSE RECEIPTS: STATUTE.** A negotiable warehouse receipt, within the meaning of Revised Statutes of 1879, chapter 11, is one given for goods stored or deposited. An instrument which imports no obligation to hold the grain in store, but is, in effect, an agreement to ship it, is not a warehouse receipt within the meaning of the Statute. *Union Savings Association v. St. Louis Grain Elevator Company*, 341.

## WASTE.

SEE ADMINISTRATION, 7.

## WEIGHT OF EVIDENCE.

SEE PRACTICE IN SUPREME COURT

## WITNESSES.

1. **WITNESS: CONVICTION OF.** The conviction of a witness cannot be proved by parol where defendant objects, but the record of such conviction must be produced. *The State v. Douglass*, 231.
2. ——— : **WHEN EXCLUDED.** It is not error to refuse to allow witnesses to testify in a criminal cause, where it does not appear that they know anything of the matter in controversy, and when counsel, upon opportunity being offered by the court, refuses to make any statement showing the relevancy of the testimony offered. *Ib.*

RULES FOR THE GOVERNMENT  
OF THE  
SUPREME COURT OF MISSOURI,

Adopted at the April Term, 1877.

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**Chief Justice, his duty.**

RULE 1. The Chief Justice shall superintend matters of order in the court room.

**Motion to be written, signed and filed.**

RULE 2. All motions in a cause shall be in writing, signed by counsel and filed of record.

**Argument of motions.**

RULE 3. No motion shall be argued unless by the direction of the court.

**Taking record from clerk's office.**

RULE 4. No member of the bar shall be permitted to take a record from the clerk's office without the written permission of some judge of the court.

**Diminution of record, suggestion after joinder in error.**

RULE 5. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

**Application for certiorari.**

RULE 6. Whenever a *certiorari* may be applied for, there shall be an affidavit of the defect in the transcript which it is designed to supply, and at least twenty-four



## SUPREME COURT RULES.

hours' notice shall be given to the adverse party or his attorney previous to the making of the application.

### **Notices of writs of error.**

**RULE 7.** All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and be by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

### **Reviewing Instructions.**

**RULE 8.** In actions at law it shall not be necessary for the purpose of reviewing in the Supreme Court the action of any circuit court or any other court, having, by statute, jurisdiction of civil cases in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the court of first instance be embodied in the bill of exceptions, but it shall be sufficient for the purpose of such review that the bill of exceptions state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instructions founded on it.

### **Bill of exceptions—whether there was evidence tending to prove an issue.**

**RULE 9.** If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the court of first instance shall be of opinion that there was such evidence, it shall be the duty of the court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the court that the same tends to prove such fact or issue.

### **Bill of exceptions—whether there was evidence tending to prove an issue.**

**RULE 10.** If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions, detailing all the evidence given and supposed to tend to the proof of such

#### SUPREME COURT RULES.

fact or issue, and except to the opinion of the court that it does not so tend, which bill of exceptions shall be allowed by the court by which the cause is tried.

##### **Exceptions to admission or exclusion of evidence.**

**RULE 11.** When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

##### **Bill of exceptions in equity cases.**

**RULE 12.** In cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

##### **Rule as to making out transcripts.**

**RULE 13.** The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken or writ of error is sued out, shall not, (unless an exception is saved to the regularity of the process, or its execution, or to the acquiring by the court of jurisdiction in the cause,) in making out transcripts of the record for the Supreme Court, set out the original or any subsequent writ or the return thereof; but in lieu thereof shall say (e. g.) "summons issued October 2, 1871, executed October 5, 1871," and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleading as part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter touching the organization of the court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by the bill of exceptions.

##### **Presumptions in support of bills of exceptions.**

**RULE 14.** The only purpose of a statement, in a bill of exceptions, that it sets out all the evidence in a cause, being that the Supreme Court may have before it the same matter which was decided by the court of first instance, it shall

#### SUPREME COURT RULES.

be presumed as a matter of fact in all bills of exceptions, for the future, that they contain all the evidence applicable to any particular ruling to which exception is saved.

##### **Abstracts and briefs to be filed.**

RULES 15 and 16 (as consolidated and amended at the April term, 1884). In all cases the appellant or plaintiff in error shall file with the clerk of this court on or before the day next preceding the day on which the cause is docketed for hearing, seven copies of an abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for the respondent or defendant in error, at least *thirty* days before the day on which the cause is docketed for hearing; and the counsel for the respondent or defendant in error shall, at least *ten* days before the day the cause is docketed for hearing, deliver to the counsel for appellant or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the record as he may deem necessary, and shall on or before the day next preceding the day on which said cause is docketed for hearing, file with the clerk of this court seven copies of the same, and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the clerk.

##### **Citing authorities in briefs.**

RULE 17. In citing authorities, in support of any proposition, it shall be the duty of the counsel to give the names of the parties to any case cited from any report of the adjudged cases, as well as the number of the volume

#### SUPREME COURT RULES.

and the page where the same will be found ; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, section, paging and side paging shall be set forth.

**Appellant's brief to allege errors complained of.**

**RULE 18.** The brief filed on behalf of the appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted at the argument to errors not thus specified, unless for good cause shown the court shall otherwise direct.

**Failure to comply with rules 15 and 16.**

**RULE 19.** If any appellant or plaintiff in error, in any civil cause, shall fail to comply with rules numbered 15 and 16, the court, when the cause is called for hearing, will dismiss the appeal or writ of error ; or at the option of respondent or defendant in error, continue the cause at the costs of the party in default.

**Agreed cases.**

**RULE 20.** Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligibly present to the Supreme Court, or any appellate court, the matters intended to be reviewed ; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in all appellate courts, and the judgment rendered in the court of first instance shall be affirmed or reversed according to the opinion entertained by the Supreme Court respecting the same.

**Motion for rehearing.**

**RULE 21.** Motions for a rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or

#### SUPREME COURT RULES.

with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel; and the question so submitted by counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel, but no motion for a rehearing shall be filed after the final adjournment of the court.

##### **Motion for affirmance.**

RULE 22. On motion for affirmance under section 49, article 13, chapter 110, Wagner's Statutes, the mere fact that the appellant has on file, or presents a copy of the transcript at the time such motion is made, shall not *of itself* be deemed "good cause" within the meaning of said section.

##### **Former rules rescinded.**

RULE 23. All rules not included in the foregoing enumeration are hereby rescinded.

#### ADDITIONAL RULES.

RULE 24. No writ of error from this court to the court of appeals can be issued by the clerk of this court in vacation. All applications in term time for writs of error to the court of appeals, shall be accompanied by an affidavit of the attorney of record that the cause in which such writ of error is sued out, is one of which this court has appellate jurisdiction under section 12, of article 6 of the constitution; and such affidavit shall state the facts conferring such jurisdiction, and thereupon the clerk shall issue such writ. (*Adopted at the April term, 1878.*)

RULE 25. That hereafter, in no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause. (*Adopted at the October term, 1878.*)

RULE 26. A party, in any cause, filing a motion either



SUPREME COURT RULES.

to dismiss an appeal or writ of error, or to affirm the judgment, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter or by written notice, and shall, on filing such motion, satisfy the court that such notice has been given. (*Adopted at the October term, 1879.*)